Supreme Court, U.S.
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No. : 08-8

In the

Supreme Court of the United States

ROBERT R. WATSON,

Petitioner Pro-Se,

-against-

MICHAEL B. MUKASEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

(1) Can the deportation order be valid when the OSC lacked the statutorily mandated advisals *re* notifying the Courts of any address change, the consequences of not doing so and the Service of the Notice of hearing was improper?

(2) Whether Fifth Circuit Panel's decision is in conflict with other Courts of Appeal decisions?

(3) Whether Court of Appeal committed very obvious and exceptional errors of fact and law in finding that I did not have reasonable cause for missing the deportation hearing, and the departure from its past procedure and practices in adjudicating instant case an abuse of discretion?

(4) Whether Court of Appeal precluded from using the legal argument at 8 U.S.C. section 1305 based on the principle of Res Judicata and Collateral Estoppel?

(5) Whether 8 U.S.C. § 1305 authorizes an in absentia deportation order?

(6) Whether Estrada-Trochez analogous and applicable to instant case?

(7) Whether Congress addressed the issue of rescission of a deportation order due to the lack of receipt of the notice of hearing at; 8 U.S.C § 1229a(b)(5)(C)(ii) , and is there any ambiguity in said statute?

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OPINION BELOW

The opinion of the Fifth Circuit Court of Appeals denying my petition for review of the BIA's decisions are attached. The BIA's decisions are reported at pages 1a & 2a.

STATEMENT OF THE BASIS FOR JURISDICTION

The judgment of the Court of Appeals was entered on November 29th, 2007 and a motion for rehearing was denied on January 25th, 2008. The petition for a writ of certiorari was filed on April 24th, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (I).

STATEMENT OF THE CASE

On or about July 1st, 1986, I entered the U.S.A. at Mc. Allen Texas, without inspection. I was detained and released by the Border Patrol. I retained the service of an attorney Mr. Pena. It was rumored that if you paid him, he had an inside connection and would fix whatever needs fixing.

I departed to New York shortly thereafter. I stayed at my initial address for a very brief period.

My change of address was given to Mr. Pena but not to the INS, at this time I was not aware that I had an obligation to do so. There was no information in the OSC to this effect. Knowing that Mr. Pena could contact me if necessary and I had applied and received an approved Labor Certification I naively assumed that Mr. Pena was as good as rumored. Unfortunately this proved to be wishful thinking, Mr. Pena was disbarred shortly after I paid him and apparently he did not inform the Court of my change of address. The notice of hearing was sent to my previous address and returned to the Court as undeliverable, the same with the deportation order. The notices sent to Mr. Pena were also returned to the Court, similarly notated. I was ordered deported *in absentia* because being ignorant of the hearing notice, I could not attend. Even though I had possible relief in the form of an application for Labor Certification.

I have been trying to reopen and rescind deportation proceedings based on the irrefutable, incontrovertible fact that I did not receive the notice of hearing, that I was not notified in the OSC *re* the change of address notification and thus had reasonable cause for my absence. I did not receive the hearing notice and my motions to rescind sought rescission based on the statute at 8 U.S.C. § 1229a (b)(5)(C)(ii). My motions are being denied despite the fact that these results are contrary to the plain language of the statute, which applies to all aliens who have not received the notice of hearing.

CONSTITUTIONAL REGULATIONS AND STATUTES

Order to Show Cause Pre-IRRIRA: 8 U.S.C. § 1252 b (a) (1) (F) (1993).

> (7) A statement that the alien must advise the Immigration Court having administrative control over the Record of Proceeding of his or her current address and telephone number and a statement that failure to provide such information may result in an *in absentia* hearing in accordance with §1003.26 (Amended 6/30/95; 60 FR 34089)

Method of Service Pre-IRRIRA: 8 U.S.C. § 1252(a) (2) (A) (1993).

> Section 242B of the Act provides that "[w]ritten notice [of deportation proceedings under the section] shall be given in person to the alien (or, if personal service is not practicable, written notice shall be given by certified mail to the alien...)

Motion to Reopen: 8 C.F.R. § 1003.23 Reopening or reconsideration before the Immigration Court.

> 1003.2 Reopening or reconsideration before the Board of Immigration Appeals.

(a) General. The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision. A request to reopen or reconsider any case in which a decision has been made by the Board, which request is made by the Service, or by the party affected by the decision, must be in the form of a written motion to the Board. The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board, subject to the restrictions of this section.

The Board has discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief.

***

(2) Except as provided in paragraph (c)(3) of this section, a party may file only one motion to reopen deportation or exclusion proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding south to be reopened, or on or before September 30. 1996, whichever is later. Except as provided in paragraph (c)(3) of this section, an alien, may file only one motion to reopen removal proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on

which the final administrative decision was rendered in the proceeding sought to be reopened.

(3) In removal proceedings pursuant to section 240 of the Act, the time limitation set forth in paragraph (c)(2) of this section shall not apply to a motion to reopen filed pursuant to the provisions of 1003.23(b)(4)(ii). The motion to reopen filed pursuant to the provisions of 1003.23(b)(4)(ii). The time and numerical limitations set forth in paragraph (c)(2) of this section shall not apply to a motion to reopen proceedings: (i) Filed pursuant to the provisions of 1003.23(b)(4)(iii)(A)(1) or 1003.23 (b)(4)(iii)(A)(2); (ii) To apply or reapply for asylum or withholding of deportation based on changed circumstances arising in the country of nationality or in the country to which deportation has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous hearing; (iii) Agreed upon by all parties and jointly filed. Notwithstanding such agreement, the parties may contest the issues in a reopened proceeding; or (iv) Filed by the Service in exclusion or deportation proceedings when the basis of the motion is fraud in the original proceeding or a crime that would support termination of asylum in accordance with 1208.22(f) of this chapter.

Matter of Cruz-Garcia: (1) The regulation at 8 C.F.R. § 3.23(b)(4)(iii)(1998) imposes no time or numerical limitation on aliens seeking to reopen deportation proceedings conducted *in absentia* pursuant to section 242(b) of the Immigration and Nationality Act, 8 U.S.C. § 1252(b)(1988). (2) When an alien seeks to reopen deportation proceedings conducted *in absentia* pursuant to section 242(b) of the Act, it is appropriate to apply the "reasonable cause" standard, not the "exceptional circumstances" standard set forth in section 242 B of the Act, 8 U.S.C. § 1252(b) (Supp. II 1990).

Statute at [8 U.S.C. 1229a(b)(5)(C)(ii)].

(c) Rescission of Order

Such an order may be rescinded only-

(i) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (e)(1) of this section), or

(ii) upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2) of section 1 of this title or the alien demonstrates that the alien was in Federal or State custody and the failure to appear was through no fault of the alien.

COURT OF APPEALS JURISDICTION

The Fifth Circuit Court of Appeals has jurisdiction where the appeal involves constitution claims or question of law. *See* 8 U.S.C.§ 1252 (a) (2) (D).

ARGUMENT

This Fifth Circuit panel decision should be reversed as it has no basis in the facts or relevant statutes. It is in conflict with other Circuit Court of Appeal precedent decisions, it is in conflict with this Court and even contrary to the BIA and Fifth Circuit policies. The deportation order should be voided as the statutory procedures established by statutes and regulations for the benefit of the alien were not adhered to. Under Pre-IIRIRA Law the order to show cause must warn the alien of the address change notification requirement and the consequences of failing to do so 8 U.S.C. § 1252 b (a) (1) (F) (1993). My OSC did not do so. (*See* Exhibit C, Order to Show Cause [5a]) The notice of hearing must include the date, time and place of the deportation hearing and be provided by certified mail if personal service was not possible. 8 U.S.C. § 1252(a) (2) (A) (1993). *See also Matter of M-D-*, 23 I&N Dec. 540, 546 (observing that "the use of certified mail in formal administrative proceedings is reflective of the interest at stake and is more protective of due process"). My notice was sent by regular mail. Sending the notice of hearing by regular mail is only permitted by the regulation under IIRIRA. Interpreting this mailing as proper service is an impermissible retroactive application of IIRIRA to instant case. Both procedures were mandated by statutes, the violation of which should result in the invalidation of the deportation order.

The Supreme Court has ruled "The duty to enforce an agency regulation is most evident when compliance with the regulation is mandated by the Constitution or Federal Law". (*United States v. Caceres*, 440 U.S. 741, (1979); *see also Bridges v. Wixon*, *supra*, at 152-53 (reaffirming the statement in U.S. ex rel. *Bilokumsky v. Tod*, 263 U.S. 149, 155 (1923), that one subject to deportation is legally entitled to insist upon the observance of rules promulgated by the Secretary of Labor pursuant to law).

Even if rules are not founded on a constitutional or statutory requirement an agency still has a "duty to obey them". *United States v. Caceres*, *supra*. at 751 n. 14. Although every regulatory violation need not result in the invalidation of all subsequent agency action, when the rights of individuals are affected, it is incumbent on agencies to follow their own procedures. *Morton v. Ruiz*, 415 U.S. 199, 235 (1974); *see also United States v. Calderon-Medina*, 591 F.2d 529 (9th Cir. 1979). The failure to follow a regulation or procedure of benefit to the alien which is prejudicial may requires the proceedings be invalidated as violative of due process. *See Matter of Garcia-Flores*, *supra*; *see also Hernandez-Luis v. INS*, 869 F.2d 496(9th Cir. 1989) (finding that a violation which prejudices a protected interest renders the regulation unenforceable).

Service of the notice of hearing was improper, the Court was fully aware that there were improprieties with the legal operations of the attorney of record, Mr. Pena's mails were being

returned as undeliverable. (*See* Exhibit D [10a], Memo dated February 3rd, 1988). Nonetheless the notice of hearing was mailed to Mr. Pena and the court seems to rely on this as service.(*see* Exhibit E [14a] paragraph 7) Although the regulation at 8 C. F. R. § 292.5 (a) (1995) [which provides that, when a respondent is subject to any requirement of the Act, service on counsel of record satisfies service on the respondent]. Under the circumstances of instant case this would be a draconian and unreasonable interpretation of the statute. *See United States v. Izaguirre-Flores*, 405 F.3d 270,277 (5th Cir. 2005) where the Court opined; "We will not interpret a statute in a fashion that will produce absurd results" *See also Green v. Brock Laundry Mach. Co.*, 490 U.S. 504. 527 (1989) (Scalia J. concurring, but in a context different from immigration) "We are confronted here with a statute which, if interpreted literally, produces an absurd and perhaps unconstitutional result".

The Fifth Circuit panel ruling is in conflict with several rulings and precedent decisions of other Courts of Appeal. *See* the Ninth Circuit Court of Appeal decision; In *Lahmidi v. INS*, 149 F.3d 1011 (9th Cir. 1998), which held "that there is reasonable cause for failure to appear when the alien has not receive notice of the time and place of the hearing due to a change of address and the alien was not informed of the requirement that he or she advise the INS of such changes."

The 7th and 9th Circuits have agreed that the INS should not deny reopening of an *in absentia*

deportation order where the denial leads to the unconscionable result of deporting an individual eligible for relief from deportation (*see* Exhibit F [18a] approved I-130 as spouse of USC) *See Chowdry v. INS*, 241 F.3d 848 (7th Cir. 2001). *See also Singh v. Gonzales,* Docket number: 03-40102, Second Circuit (April 20, 2006), where the Court ruled "While the BIA posited several reasons for affirming the IJ's denial of the petitioner's motion to reopen after the IJ ordered him deported *in absentia*, and for denying the petitioner's motion to reconsider its prior order, these denials amounted to an abuse of discretion, because neither the IJ nor the BIA addressed Singh's exceptional circumstances argument in light of his eligibility to adjust status based on his marriage to a U.S. citizen."

See also Joshua v. Ashcroft, (2004, CA 7) 389 F.3d 732, "when issue is not notice but receipt, because statute allows alien ordered deported, removed *in absentia* proceedings to reopen proceedings if he did not receive notice even if notice that was sent, whether or not it was received, satisfied statutory and constitutional requirement, intended recipient affidavit of non receipt is evidence" (*see* Exhibit E [14a] I J's M&O paragraph 6). In the same case the Seventh Circuit Court of Appeal also observed, " that even if notice is properly served in accordance with the statute , the key issue in deciding whether to reopen proceedings after entry of an *in absentia* order is whether notice was received".

Although IJ properly entered initial *in absentia* order of removal based on attempted service under 8 U.S.C.S. § 1229(i). IJ should have granted alien's motion to reopen, under 8 U.S.C.S. § 1229a (b)(5), in face of conclusive proof that he did not receive notice and that there was no basis in the record to show that the alien thwarted delivery. *Sabir v. Gonzales*, (2005 CA7) 421 F.3d 456. The OSC lacked the required notification advisals, thus I was unaware of my obligation to inform the court of any address change and could not be charged with thwarting delivery. As a matter of fact after receiving Labor Certification without any adverse reaction from the authorities, I assumed that Mr. Pena's fee was money well spent and my immigration problems were over with.

The fifth circuit panel ruling that I lacked reasonable cause for missing the deportation hearing is not supported by the facts of instant case. It is an irrefutable fact that the OSC lacked the statutorily required address change notification. The Ninth Circuit Court of Appeal in their precedent decision; In *Lahmidi v. INS*, 149 F.3d 1011 (9th Cir. 1998), held that "there is reasonable cause for failure to appear when the alien has not received notice of the time and place of the hearing due to a change of address and the alien was not informed of the requirement that he or she advise the INS of such changes."

The Fifth Circuit panel in this ruling has completely departed from the policies and practices of the Fifth Circuit Court of Appeal. As a matter of

fact the methodology and decision making is totally different from recent decisions of this same panel. *See.* Case No. 07-60130, *Komi Adjonke petitioner v. Michael B Mukasey*, U.S. Attorney General, respondent. [unpublished] (Exhibit G [21a]). In that decision all facets of Adjonke's claims were discussed and compared with the Administrative Record. Contrast that with the panel's action in my case where it was said "He also contends that the deportation order is invalid because the hearing notice and the Order to Show Cause failed to advise him of his statutory duty to inform the Government of any change in his address." The panel said nothing about the veracity of my claim but implied by omission that this was not a fact, although a very cursory examination of the Order to Show Cause would prove otherwise.

My Equal Protection Rights implicit in the Fourteenth Amendment of the Constitution were definitely violated. There was no rational, basis for my case being treated differently than the abovementioned case. His case was also presented Pro Se, the case was decided only one day before instant case. There were no changes in the INA during this time span, and most importantly, the Fifth Circuit panel consists of the same three Judges. *See Brieva-Perez v. Gonzales*, 482 F.3d 356, 362 (5th Cir. 2007).

This panel has turned a blind eye to the BIA's actions in instant case; I have consistently made the argument that the BIA ignored my legal arguments. Such as the lack of advisal in the OSC, the fact that

I did not receive the notice of hearing, the fact that the lawyer on record was disbarred and the legal implications of his disbarment, the fact that I did not receive written or oral notice of the time and place of my deportation hearing, the fact that my I-130 application was approved as the spouse of a U.S.C. (thus an immigrant visa was immediately available), I was ineffectively represented by counsel, my due process rights were violated and my equal protection rights the same.

The BIA disregarded many of its Precedent Decisions, even though it is mandated by its own Precedent and Regulation (8 C.F.R. § 1003.1(g)(5)) to do otherwise. The BIA had incorrectly ruled that my motions were untimely and number barred, citing 8 C.F.R. § 1003.2(c)(2)(2006) (*See* Exhibit H [26a], decisions dated November 13, 2006), only to rule otherwise (*See* Exhibit I [28a]) , decision dated Feb. 6th, 2007, AR pg 000002). It is by definition an abuse of discretion when an Immigration Judge makes an error of law or has considered the wrong factors in applying its discretion, *United States v. Lipscomb*, 299 F.3d 303, 338 (5th Cir. 2002) (quoting *Koon v. United States*, 518 U.S. 81.100(1996).

It is incredulous that this Fifth Circuit panel somehow found nothing arbitrary and capricious in the manner which the BIA adjudicated instant case. Especially in light of In re; *Alicia Reyes- Chavez*, File: A76 961 578-Boston. In one of my motions I presented the same argument (and more), and evidence supporting my claim of non-receipt of the notice of hearing, in the forms of (1) A notarized

affidavit stating non-receipt of the NOH. (averred to under the risk of perjury) (2) Documentary evidence in the form of four envelopes returned to the Immigration Court as undeliverable. (3) Immigration Judge's Memorandum and Order, in which the INS Counsel admits to possession of all mailed notices to Mr. Pena and myself.

Despite the favorable ruling in *Alicia Reyes-Chavez,* my motion was denied, and furthermore it was denied by the same Judge who reopened the aforementioned case. Another obvious violation of my Equal Protection Rights under the Constitution.

The BIA's decision dated November 13, 2006, which denied my motion to reopen and rescind as being untimely and number barred was, definitely incorrect in the law. I did a motion to reconsider, citing *Matter of Cruz-Garcia*, 22 I&N Dec. 1155, 1157 (BIA 1999)," the Board held that the regulation at 8 C.F.R. 1003.2(b)(4)(iii)(1998) imposes no time or numerical limitation on aliens seeking to reopen deportation proceedings conducted *in absentia* pursuant to section 242(b) of the Immigration and Nationality Act, 8 U.S.C. § 1252(b)."

The BIA judge in his ruling agreed (*see* Exhibit I [28a]), but still denied reopening. This was particularly egregious as this was a motion to reconsider a decision which was incorrect in the law and said motion was unopposed by the INS. Given the fact that the Judge agreed that the previous decision was wrong in the Law, he did not have the discretion to deny reopening. He was bound by the

statutes enacted by Congress. *See* 8 U.S.C. § 1229a (c)(6) (2000); 8 C.F.R.1003.2(b) (1) (2002), 'a motion to reconsider deals with errors of fact or law and is supported by pertinent authority' This decision was clearly an abuse of discretion and the Fifth Circuit panel was derelict in its duty in not recognizing and ruling accordingly.

The Fifth Circuit policy and precedent compels reopening instant case. *See* precedent case no. 94-40108, *Jose Luis Rodriquez-Gutierrez, petitioner, versus Immigration and Naturalization Services,* respondent where court ruled proceedings should be reopened where I-130 is approved so adjustment could be adjudicated.

See also Patrick Isi Ikhifa, petitioner, v .INS, respondent Docket No.93-5030. Even though *Ikhifa* was convicted of several felonies. The Fifth Circuit Panel ruled that his motion to reopen should be approved based on his approved I-130, exactly the same fact in instant case, minus the criminality issue.

See also Nihad Rahmon, petitioner v. John Ashcroft, U.S, Attorney General, respondent, Docket no. 02-60226 5th Cir. (Jan. 03, 2003) (Exhibit J [30a]).

It's an obvious abuse of discretion for the BIA to disregard legal arguments relevant and germane to instant case. The BIA was legally bound to follow circuit court precedent in cases arising in the circuit, *Anselmo,* 20 I&N Dec. 25 (1989); *Abdulai v. INS.* 239

F.3d 542)(3rd Cir. 2001)- generally cited. The BIA was also legally bound to follow its own precedents.

Particularly egregious is the BIA ignoring its precedent decision, in the *Matter of Garcia* 16 Interim Dec.653 (BIA 1978),where the BIA stated that "discretion should, as a general rule, be favorably exercised where a prima facie approvable visa petition and adjustment application have been submitted in the course of a deportation proceeding or upon a motion to reopen." This precedent decision highlights the extreme abuse of discretion which was directed at instant case. This precedent demands reopening of deportation proceedings when a prima facie approvable immigrant petition is filed along with an application for adjustment. My motion to reopen was denied even though I had submitted an approved I-130 with my application for adjustment.

The Fifth Circuit panel's citation of 8 U.S.C. § 1305(a) (1986),to deny my petition for review, is exactly the same legal argument the INS argued to the BIA. The BIA in an en banc decision totally rejected this legal argument in 23 I&N Dec. 181 (BIA 2001) (*Matter of In re G-Y-R-, Respondent*).

Despite Fifth Circuit policy that, "we accord deference to the BIA's interpretation of the immigration statute unless there are compelling indications that its interpretation is incorrect". *Faddoul v. INS*, 37 F.3d 185, 186 (5th Cir.1994) (citation omitted), this panel has refused to defer to BIA's interpretation, *In re G-Y-R-, Respondent. See also*, an agency's interpretation of the statutes and

regulations it administers should be given great deference. *See Efe v. Ashcroft*, 293 F.3d 899, 903-04 (5th Cir.2002) (citing *Chevron U.S.A., Inc. v. Natural Resources Def. Council*, 467 U.S. 837 (1984). When reviewing the construction and application of agency regulations, the Court must give "controlling weight" to the agency's interpretation unless it's "plainly erroneous or inconsistent with the regulation." *United States v. Larionoff*, 431 U.S. 864, 872 (1977) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410,414 (1945)).

The Fifth Circuit panel should be precluded from using this legal premise to deny a petition for review of a BIA's decision based on the principle of *res judicata*. I contend that the Fifth Circuit panel citing of 8 U.S.C. § 1305(a) constitutes a collateral jurisdictional attack on the BIA's past decision and should be barred by *res judicata*.

The panel stated that it was my fault that I did not receive the notice of hearing because I moved without informing the Court. There should be *estopell* of deportation, due to the fact that I should have been warned in the OSC *re* my statutory address change notification obligation. This was specifically mandated by the regulation at 8 C.F.R.§ 1003.15(b)(7)

See Cormil-Rodriquez v. Immigration and Naturalization Services, (1976, CA2) 532 F.2d 301). Where the failure to warn alien that marriage prior to entry would invalidate visa issued to her as a child of U.S. resident, which failure was in violation

of specific duty imposed by 22 C.F.R. § 42.122(d), necessitated reversal of deportation order based on alien's marriage three days prior to entry.

The Fifth Circuit panel correctly points out that I have an obligation to provide the Service with a current address pursuant to the registration requirements of the Act. Virtually every alien in the United States is under an affirmative obligation to report address changes to the Attorney General, regardless of immigration status or circumstances. The statutory consequences of failing to report an address change as required by section 265 (a) include a possible misdemeanor conviction, with a potential fine of up to $200 and not more than 30 days' imprisonment, and placement into removal proceedings pursuant to chapter 4 of Title 8 of the United States Code. *See* Section 266 (b) of the Act. These penalties are not imposed, however, if the alien can demonstrate that the failure to keep his or her address current "was reasonably excusable or was not willful." *Id.*; *see also* Section 237(a)(3)(A) of the Act, 8 U.S.C. § 1227(a)(3)(A) (Supp. V 1999).

Although the failure to comply with section 265 and its surrounding provisions may incur various penalties, the entry of an *in absentia* order of removal is not one of them. *In absentia* orders arise from, and are governed by, section 240(b)(5) of the Act. It is that provision, not any of the registration provisions, that contains the requirements and the legal authority for the entry of an *in absentia* order of removal.

Based on the plain reading of the statute it is obvious that a violation of 8 U.S.C.§ 1305(a) do not authorize the issuance of an *in absentia* deportation order. This Court has opined "We have stated time and again that Courts must presume that a legislature says in a statute what it means and means in a statute what it says there". *Connecticut Nat'l Bank v.Germain*, 503 U.S. 249, 253-54 (1992). *See also United States v. Gonzales*, 520 U.S. 1, 6 (1997), "When the language of the statute is plain, legislative history is irrelevant".

The Fifth Circuit panel relies on *Estrada-Trochez* to support its decision to deny my petition for review. However *Estrada-Trochez* does not control instant case. This case involves actual receipt or non-receipt of the notice of hearing, which is the controlling principle and not constructive notice. While *Estrada-Trochez* is similar in that both cases claimed that the hearing notices were not received, that's where the similarity begins and ends. *Estrada-Troschez* did not involve a case where the alien was not warned in the OSC about his obligation to notify the authorities about any address change. *Estrada-Trochez* did not involve a case where the attorney of record was disbarred. *Estrada-Trochez* claimed that this lack of receipt violated procedural due process, but it is settled law that notice does not have to be actually received to satisfy due process, once the notice is sent via the statutorily prescribed manner. *See Jones v. Flowers*, No. 04-1477,slip op. at 4-5 (U.S.Apr.26,2006) (notice is deemed constitutionally sufficient "if it was reasonably calculated to reach the intended recipient

when sent" and the government "heard nothing back indicating that anything had gone awry"). In my case the Court knew all notices were returned.

Instant case is inapposite, my motion requested rescission based on non receipt of the hearing notice. In its decision the Fifth Circuit panel concluded that I did not receive said notice, but argued, it was my fault because I moved without notifying the authorities. This interpretation is invalid and not in keeping with the Statute. The Statute at [8 U.S.C. 1229a(b)(5)(C)(ii)], which provides that A"[a]n order entered *in absentia* in deportation proceedings may be rescinded only upon a motion to reopen filed...[a]t any time if the alien demonstrates that he or she did not receive notice." There is nothing ambiguous about this statute.

The Fifth Circuit panel concluded that I did not receive the hearing notice, thus the petition for review should have been granted as per the above mentioned statute. "If the intent of Congress is clear, that is the end of the matter, for the Court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A. Inc v. Natural Resources Defense Council, Inc.* 467. U.S. 837, 842-43 (1984). Where Congress' intent is clearly enacted in unambiguous language, that language is conclusive. *Negonsott v. Samuels*. .It is well settled that the language of the statute is the starting point of statutory construction. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987). The plain meaning of the words used in the statute as a whole has been held to be the paramount index of

congressional intent. Id. at 431; *Matter of W-F-, Interim Decision* 3288, at 6 (BIA 1996). Moreover, it is assumed that the legislative purpose is expressed by the ordinary meaning of the words used. *INS v. Phinpathya*, 464 U.S. 183, 189 (1984); *see also Matter of Shaar*, interim decision 3290 (BIA 1996), aff'd, 141 F.3d 953 (9th Cir).

CONCLUSION

This deportation proceeding has been adjudicated in an unlawful, arbitrary and capricious manner from day one. After two motions to reopen which were incorrectly denied as being untimely and number barred. I submitted a motion to rescind and reopen to the Immigration Judge based on the statute. Any *in absentia* order made under I.N.A. §§ 242 (b)(1) [8 U.S.C.S. § 1252(b)(2)] and 242 B (c)(1) [8 U.S.C.S. § 1252 b (c) (1), may only be rescinded by filing a motion to reopen with the Immigration Judge; the alien may take an appeal to the BIA if the motion to reopen is denied by the Immigration Judge. *In re Gonzalez-Lopez* (1993 BIA) 20 I&N Dec. 644. The motion was returned stating that jurisdiction was with the BIA. (*See* Exhibit K [33a]).

The BIA and the Fifth Circuit panel exceeded its discretion by failing to consider all circumstances that I provided to rebut presumption that I had absconded and deliberately avoided the scheduled deportation hearing. The BIA and Fifth Circuit panel failed to consider three facts that weighed in

my favor, first by filing application for Alien Labor Certification [filed 09/02/1987 approved 08/08/1989] (*see* Exhibit L [42a]). I initiated proceedings to obtain benefit which made it less likely that I would simply ignore later immigration proceeding of which I had notice, secondly, by providing recent photograph and current address in the Labor Certification application I had done something to indicate that I was not an absconder, lastly, I disclosed the order of deportation when I filed motion to reopen in an effort to adjust status to Legal Permanent Resident on Dec, 19, 2002. (*See* Exhibit L [42a]). *See Silva-Carvalho Lopez v. Gonzales* (2006, CA2) 468 F.3d 81.

This Fifth Circuit panel's denial of my petition for review is based on the fact that I moved without informing the authorities, yet this information is exactly what the advisal in the OSC was statutorily required to contain and did not do so. This is not only unlawful as evidenced by the BIA's decision in its en banc decision in, [In re G-Y-R-, Respondent] 23 I&N Dec. 181 (BIA 2001). It is patently unfair.

This Court has opined that "Deportation proceedings involve the potential deprivation of a significant liberty interest and must be conducted according to the principle of fundamental fairness and substantial justice" *See Landon v. Plasencia,* 459 U.S. 21, 34-35 (1982); *Goldberg v. Kelly,* 397 U.S. 254 (1970); *Bridges v. Wixon,* 326 U.S. 135, 154 (1945) (stating that deportation "visits a great hardship on the individual.....Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential

standard of fairness."); *see also INS v. Cardoza-Fonseca*, 480 U. S. 421, 449 (1987); *Harislades v. Shaughnessey*, 342 U. S. 580 (1952); *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

The Fifth Circuit panel did not contest the fact that I did not receive the hearing notice but rather claimed that the lack of receipt was my fault because I moved without informing the Courts. This was an invalid interpretation of the statute. Congress did not condition rescission on whether or not the alien was at fault for not receiving the hearing notice. Congress was fully capable of doing so if that was its intent. See fifth circuit n, Case no.02-60409 (unpublished) *Oscar Manuel Guzma petitioner, v. INS, respondent* (end of first paragraph)," If that were Congress's intent . . . the statute that mandates entry of an *in absentia* order when an alien fails to appear would presumably contain such an exception."

This panel has misinterpreted the above-mentioned statute, the controlling issue is receipt or non-receipt of the hearing notice, unlike *Estrada-Trochez* where Appellant moved to re-open the 1987 deportation proceeding, asserting that he was denied procedural due process because neither he nor his attorney of record received notice of the deportation hearing. To satisfy procedural due process the controlling issue is proper service of the hearing notice. Two completely different situations. The fact that the notice was served and may have satisfied the notice requirement does not necessarily mean that the hearing notice was received. This panel in

its ruling confirmed the fact that the notice was not received. Thus rescission was authorized as per the statute at [8U.S.C. 1229a (b)(5)(C)(ii)].

Combining 8 U.S.C. § 1305(a)(1986) with *United States v. Estrada-Trochez*, 66 F.3d 773,735 (5th Cir.1995) was an adroit but futile and legally impermissible attempt to mold the statute towards the panel's decision. There is no nexus between the combination and the authority to deport *in absentia*. The penalty for a breach of the former does not include an *in absentia* deportation ruling and the latter is inapplicable to instant case as the statute clearly states that "rescission is authorized once lack of receipt of notice is established." This panel's decision would effectively read [8 U.S.C. 1229a (b)(5)(C)(ii)],out of the INA.

This decision would effectively separate and destroy our family. My wife and daughter are United States Citizens, the former by naturalization and the latter by birth. My daughter is a special needs child (*see* Exhibit M [44m]). If deported, I would have no choice but to leave my family behind, as the various therapies which my daughter receives which have been extremely beneficial would not be readily available in Jamaica.

My wife is experiencing extreme financial difficulties; bills are being paid later and later every month. Her credit score is borderline and heading in the wrong direction. Our daughter recently had a cough which she could not shake and we are convinced that this was due to the fact that we could

not afford to heat the house as usual due to the fact that we had to ration our oil usage. As a matter of fact we ran out of oil three times this winter. This is particularly alarming considering the fact that our daughter is already predisposed to respiratory distress syndrome (*see* Exhibit M [44a]). Even though my wife earns a fairly decent salary as a registered nurse, my financial contribution is still needed. At the moment my contribution is limited to taking care of the baby and supervising the trucking operation.

We own a small trucking outfit, there were two trucks but one was recently repossessed due to the extreme shortage of CDL drivers. I am unable to work because my class A license has been suspended for lack of a valid social security number. This has adversely affected our cash flow as the salaries to retain qualified drivers are very high.

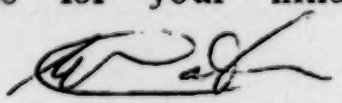
It's a travesty of justice that I am facing deportation, my wife of twelve years and my six years plus old daughter are living under adverse conditions due in large part to the obviously incorrect rulings from the BIA and this Fifth Circuit panel.

Currently we are facing the possibility of foreclosure on one of our houses. The ARM has been adjusted on both mortgages and things are not looking good, and to compound our situation, we have a problem tenant, (in eviction proceedings). If I had my license, and authorized to work, we could very easily manage our financial affairs.

The relief I'm seeking, due to the obvious incorrectness in the law, is for this Court to direct the Fifth Circuit Court to grant the petition for review, rescind the deportation order and allow the adjudication of my adjustment application. Appellate Court has authority to reverse immigration judge's decision without remanding matter for further adjudication if matter on appeal presented manifest error of law and no further fact finding was required. *Ghedbremedhin v. Ashcroft,* (2004 CA7) 392 F.3d 241.

Additionally, deportation proceedings may be terminated as "Improvidently begun" even after deportation hearing has proceeded to formal conclusion and deportation order has been entered (decided under former 8 U.S.C.S. § 1252) *In re Vizcara-Delgado,* (BIA 1968) 13 I&N Dec. 51.

I trust and hope your decision will be favorable, Thanks in advance for your kind consideration.



Robert R. Watson.

APPENDIX

Opinion, Order of the Fifth Circuit of Appeals, filed, November 29th, 2007, denied petition for review. With a citation of 8 U.S.C.§ 1305(a) (1986) and stating "Notice of Watson's deportation hearing was properly mailed to his last known address, citing *United States v. Estrada-Trochez*, 66 F.3d 733, 735-736 (5th Cir. 1995) The notices were returned as undeliverable, however, because Watson moved without providing a forwarding address Watson has not shown any error in the BIA's determination that lack of notice under the circumstances, does not constitute reasonable cause for failure to appear.

(i) Petition for rehearing was denied on January 25th, 2008.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-60319

U.S. COURT OF APPEALS
FILED
JAN 25 2008
CHARLES R. FULBRUGE III
CLERK

ROBERT RANDALL WATSON

Petitioner

v.

MICHAEL B MUKASEY, U.S. ATTORNEY GENERAL

Respondent

- -

Petitions for Review of an Order of the Board of Immigration Appeals

- -

ON PETITION FOR REHEARING

Before King, Davis, and Clement, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

Entered for the Court:

EPClement

United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States court of Appeals
Fifth Circuit
FILED
November 29,2007
Charles R. Fulbruge
Clerk

No. 06-60319
Summary Calendar

Ill

ROBERT RANDALL WATSON

Petitioner

v.

MICHAEL B MUKASEY, U.S. ATTORNEY GENERAL

Respondent

Petition for Review of an Order of the Board of Immigration Appeals
BIA No. A28 319 026

Before KING, DAVIS, and CLEMENT, Circuit Judges.

PER CURIAM:[1]

Robert Randall Watson, a native and citizen of Jamaica, has filed three petitions for review of the Board of Immigration Appeals' (BIA) orders dismissing his motions to reopen and reconsider the

[1] Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

1988 deportation proceedings that resulted in an order of deportation being entered *in absentia* against him. Watson seeks to reopen the proceedings so that he can apply for adjustment of status to a lawful permanent resident based on being the beneficiary of an I-130 relative visa petition, which was filed on behalf of his United States citizen wife. Watson contends that he did not receive notice of the deportation hearing due to his counsel's ineffectiveness. He also contends that the deportation order is invalid because the hearing notice and the Order to Show Cause failed to advise him of his statutory duty to inform the Government of any change in his address.

The BIA's denial of an appeal and its denial of a motion to reconsider are two separate final orders, each of which require their own petitons for review. *Stone v. I.N.S.*, 514 U.S. 386, 394 (1995). An alien must file his petition for review "not later than 30 days after the date of the order of final removal." 8 U.S.C. §1252(b)(1). A timely petition for review is a jurisdictional requirement, and the lack thereof deprives this court of jurisdiction to review a decision of the BIA. § 1252(a)(5); *Karimian-Kaklaki v. I.N.S.*, 997 F.2D 108, 111 (5th Cir. 1993). In the instant case, Watson file dtimely petitons for review from the BIA's March 22, 2006 and November 13, 2006 decisions. However, he did not file a timely petition for review from the BIA's February 6, 2007 decision. Accordingly this court is without jurisdiction to review that petition for review. *See Karimian-Kaklaki*, 997 F.2d at 111.

Watson had an obligation to notify the Attorney General of any changes to his address. 8 U.S.C. § 1305(a) (1986). Notice of Watson's deportation hearing was properly mailed to his last known address. *See United States v. Estrada-Trochez*, 66 F.3d 733, 735-36 (5th Cir. 1995). The notice was returned as undeliverable, however, because Watson moved without providing a forwarding address. Watson has not shown any error in the BIA's determination that lack of notice, under these circumstances, does not constitute reasonable cause for failure to appear. *Id.* At 736. Consequently, Watson has failed to demonstrate that the BIA abused its discretion in denying his motions to reopen and reconsider. *See Lara v. Trominski*, 216 F.3d 487, 496 (5th Cir. 2000).

Accordingly his petitions for review are DENIED in part and DISMISSED in part for lack jurisdiction. His motion to amend his reply brief is DENIED as moot.

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

ORDER TO SHOW CAUSE, NOTICE OF HEARING, AND WARRANT FOR ARREST OF ALIEN

In Deportation Proceedings under Section 242 of the Immigration and Nationality Act.

UNITED STATES OF AMERICA:

File No. A28 319 026

In the Matter of Robert Randall Watson
120 East 18th Street, Apt. 1N
Brooklyn, New York, N.Y. 11226
Respondent.

Address (number, street, city, state, and ZIP code)

UPON inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;
2. You are a native of Jamaica and a citizen of Jamaica;
3. You entered the United States near Los Ebanos, Texas on or about June 30, 1986;
4. You were not then inspected by an Immigration officer.

BEST AVAILABLE COPY

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation, pursuant to the following provision(s) of law:
Section 241 (a)(2) of the Immigration and Nationality Act, in that you entered the United States without inspection.

WHEREFORE YOU ARE ORDERED to appear for hearing before an Immigration Judge of the Immigration and Naturalization Service of the United States Department of Justice at _____on TO BE SET at_____m, and show cause why you should not be deported from the United Sates on the charge(s) set forth above.

WARRANT FOR ARREST OF ALIEN

By virtue of the authority vested in me by the immigration laws of the United States and the regulations issued pursuant thereto, I have commanded that you be taken into custody for proceedings thereafter in accordance with the applicable provisions of the immigration laws and regulations, and this order shall serve as a warrant to any Immigration Officer to take you into custody. The conditions for your detention or release are set on the reverse hereof.

Dated: July 1, 1986
10:00am

se are set on otherwise hereof.

(signature and title of issuing officer)

David G. Turner, Jr.
Deputy District Director

Harlingen, Texas (City and State) 78551

NOTICE TO RESPONDENT

ANY STATEMENT YOU MAKE MAY BE USED AGAINST YOU IN DEPORTATION PROCEEDINGS

THE COPY OF THIS ORDER SERVED UPON YOU IS EVIDENCE OF YOUR ALIEN REGISTRATION WHILE YOU ARE UNDER DEPORATION PROCEEDINGS, THE LAW REQUIRES THAT IT BE CARRIED WITH YOU AT ALL TIMES

If you so choose, you may be represented in this proceeding at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Immigration and Naturalization Service. You should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you should bring the original and certified translation thereof. If you wish to have the testimony of any witness considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Order to Show Cause and that you are deportable on the charge set forth therein. You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the Government. Failure to attend the hearing at the time and place designated

hereon my result in a determination being made by the Immigration Judge in your absence.

You will be advised by the Immigration Judge, before whom you appear, of any relief from deportation for which you may appeal eligible. You will be given reasonable opportunity to make any such application to the Immigration Judge.

NOTICE OF CUSTODY DETERMINATION

Pursuant to the authority of Part 242.2, Title 8, Code of Federal Regulations, the authorized officer has determined that pending a final determination of deportability in your case, and, in the event you are ordered deported, until your departure from the United States is effected, but not to exceed six months from the date of the final order of deportation under administrative processes, or from the date of the final order of the court, if judicial review is had, you shall be:

☐ Detained in the custody of this Service.
☑ Released on recognizance.
☐ Released under bond in the amount of $__

You may request the Immigration Judge to redetermine this decision.

☐ I do ☐do not request a redetermination by an Immigration Judge of the custody decision.

_____ _____
(signature of respondent) (date)

REQUEST FOR PROMPT HEARING

To expedite determination of my case, I request an immediate hearing, and waive any right I may have to more extended notice.

(signature of respondent) (date)

CERTIFICATE OF SERVICE

Served by me at McAllen, Texas on July 1 19 86 at 1031 a m.

Personal Service BDA
(signature and title of employee or officer)

BEST AVAILABLE COPY

MEMO TO FILE BY JUDGE,
RE: NOTICE TO RESPONDENT DATE:2-3-88

Case No. A28-319-026 NAME WATSON, ROBT.

THE ITEMS CHECKED BELOW APPLY
TO THIS CASE:

_____ Notice was sent to Respondent at his last known address as Respondent's counsel of record, Gil Garza, was disbarred by the Texas Supreme Court in summer, 1987 and can no longer practice law.

_✓_ Notice was sent to Respondent at his last known address as Respondent's counsel of record, Librado Pena, was disbarred by the Texas Supreme Court in September, 1987, as the Court learned in January, 1988. Prior to Librado Pena's actual disbarment, the Court had for many months sent notice in duplicate, to him and to his clients, as notices to Pena were being consistently returned by the post office with notations that he had moved without leaving a forwarding address

____ In response to inquiry by the Court, the Trial Attorney for I.N.S. has advised the Court that Respondent was released on his own recognizance by I.N.S., subject to the condition that he not depart from the Harlingen I.N.S. District without obtaining permission from the District Director (or posting a bond). As the Trial Attorney has no record that Respondent ever received permission or posted such a bond, and there is no indication that Respondent

left this District without authorization, and the address which I.N.S. has provided to the Court for notice to Respondent is outside this District, the Court will assume that Respondent is still prevented by I.N.S. from traveling to the place to which notice would be sent, and on that basis the court will not enter an order adverse to Respondent, or assume that Respondent has actual notice of hearings in this case.

_____ On this date the Trial Attorney for I.N.S. has advised the Court that the following address appears to be the best address for notice to Respondent

Address_____

_____Source_____

_____ Other _____

Texas Bar Journal January 1988
Vol. 51 No. 1

Disciplinary Actions

Disbarments

Richard Flume, Jr., of San Antonio, was disbarred by judgment of the 37th Judicial District Court of Bexar County on Sept. 4, 1987. The court found Flume engaged in conduct prejudicial to the administration of justice, handled legal matters without adequate preparation, willfully or intentionally neglected legal matters entrusted to him, intentionally failed to seek the lawful objectives of clients, intentionally failed to carry out contracts of employment, and intentionally prejudiced or damaged clients during the course of the professional responsibility.

The 200th Judicial District Court of Travis County disbarred Charles Hoehne, attorney of Travis County, by default judgment entered on Sept. 9, 1987. The court found Hoehne willfully or intentionally neglected legal matters entrusted to him by clients, and intentionally failed to carry out contracts of employment entered into with clients for professional services. Hoehne also failed to promptly pay or deliver to a client as requested by the client the funds, securities, or other properties in his possession which the client was entitled to received and then failed to furnish information requested by a grievance committee or assort grounds for failure to do so.

The 11th Judicial District Court of Harris County entered a judgment of disbarment of Jose Medina, a Houston attorney, on Aug. 31, 1987. The court found Medina violated Disciplinary Rules 1-102 (A)(4), (5), and (6); 6-101 (A)(1), (2), and (3); 7-101 (A)(1), (2), and (3); and 9-102 (B)(9), as well as Article X, Sections 7(4) and (7) of all the State Bar Rules.

Librado Pena, an attorney of Webb County, was disbarred by Judgment Nihil Dicit of the 11th Judicial District Court of Webb County. The court found Pena received money from numberous clients and failed to provide the legal services for which he was retained. The court further found Pena failed to furnish information requested by a grievance committee in its investigation of complaints filed against him and failed to appear to testify before the committee, though subpoenaed to do so. The court signed the judgment on Sept. 29, 1987.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW IMMIGRATION COURT
201 EAST JACKSON STREET
HARLINGEN, TEXAS 78550

IN THE MATTER OF:
ROBERT RANDALL WATSON)
)
RESPONDENT)
) CASE NO. A28 319 026
IN DEPORTATION PROCEEDINGS)

MEMORANDUM AND ORDER

On November 26, 2002, Respondent, through his counsel of record Eunice Becker, filed a motion to reopen his deportation proceeding. The deportation order was issued in this case on February 5, 1988 based upon a deportation hearing held on February 3, 1988. The Immigration Service has filed a response in Opposition to the motion to reopen.

On July 11, 1986, Respondent filed his "Affidavit" with the Court in this deportation proceeding (Exh. #2). In that affidavit, Respondent admitted "the allegations and deportability of the Order To Show Cause". In addition, in that affidavit, Respondent states: "Country I request to be deported to: Jamaica". Respondent further states in the affidavit that the relief requested is a change of venue to New York, N.Y. and that his address is "130 East 18th St., Apt. 1N, Brooklin, New York 11226". In the affidavit, Respondent did not request any

relief from deportation pursuant to any provision of the Immigration and Nationality Act (the Act), and he did not file any application for relief from deportation, On July 11, 1986, there was also a Notice of Entry of Appearance as Attorney or Representative (for G-28) filed with the Court n this proceeding by attorney Librado Pena.

On December 9, 1987, this Court sent a hearing notice to counsel of record Mr. Pena (Exh. #3) at the address Mr. Pena had informed the Court was his new address as of September 3, 1986 (see copy of letter attached as Appendix 1). The hearing notice sent to Mr. Pena for Respondent's February 3, 1988 deportation hearing was returned to this Court by the United States Postal Service as undeliverable with the notation "moved left no address" (Exh.#6). As reported in the Texas Bar Journal in January 1988, Mr. Pena was disbarred in the State of Texas by a court judgment signed on September 29, 1987 (copy of Bar Journal page attached as Appendix 2). See also Exh. #5.

The Court also sent respondent a hearing notice for his February 3, 1988 hearing (Exh. #3). This hearing notice was sent to Respondent at the address provided in his affidavit, and it was returned to this Court by the United States Postal Service as undeliverable with the notation "moved-not forwardable" (Exh. #7). It is noted that the deportation order sent to Respondent at the same address was also returned to this Court by the United States Postal Service as undeliverable for the same reason.

Respondent did not appear at his deportation hearing scheduled for and held on February 3, 1988. On February 5, 1988, the Court issued an order that Respondent had abandoned any claim for relief from deportation by his failure to appear at his February 3, 1988 hearing, and the Court ordered that Respondent be deported to Jamaica.

In his affidavit submitted with the motion to reopen, Respondent states that, upon being released from custody by the Immigration Service on July 2, 1986, he went o the New York area to reside and he has resided there since that time. In the affidavit, Respondent also states that he never received any notice of his hearing date and that he did not know when to appear. In the motion to reopen, Respondent does not state the address or addresses where he actually resided or received his mail in New York on or before February 3, 1988. Respondent also has not shown, or even contended, that he advised this Court or the Immigration Service of any change of address for him on or before February 3, 1988.

The Court concludes that this Court sent proper notice to Respondent fro his February 3, 1988 deportation hearing. A notice of hearing was sent to Respondent's attorney of record at counsel's last known address. A notice of hearing was also sent to Respondent at his last known address. Respondent has not shown that he was not provided with proper notice of his February 3, 1988 deportation hearing, and he has not demonstrated that he had reasonable cause for his failure to appear at the hearing. See Matter of Cruz-Garcia, 22 I & N Dec. 1155 (BIA

1999); Matter of Mancera, 22 I & N Dec. 79 (BIA 1998).

In the motion to reopen, respondent requests reopening in order to apply for adjustment of status pursuant to Section 245(i) of the Act. In his affidavit submitted with the motion to reopen, Respondent appears to be requesting voluntary departure under Section 244(e) of the Act (as in effect before April 1, 1997) because he states that he has the funds to pay for his ticket "home", and he will depart as permitted. The Court concludes that the motion to reopen to apply for adjustment of status and/or volumtary departure is untimely because it was not filed by September 30, 1996. See 8 C.F.R. 3.23(b)(1); Matter of Cruz-Garcia, supra, at 1160.

WHEREFORE, it is hereby Ordered that Respondent's motion to reopen be denied.

Dated this 27th day of January, 2003.

Howard Achtsam

HOWARD ACHTSAM
IMMGRATION JUDGE

U.S. Department of Justice
Immigration and Naturalization Service

Notice of Action

THE UNITED STATES OF AMERICA

Receipt Number / Case Type I130
EAC-97-152-53052 /Immigrant Petition for Relative, Fiance (e), or Orphan

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Receipt Date /Priority Date / Petitioner A44 141 790
May 14, 1997/March 31, 1997/Fuller Watson,Vena C.

Notice Date / Page / Beneficiary
June 17, 2003 / 1 of 1 / Watson, Robert R.

Vena C. Fuller Watson /Notice type:
195-14 Hollis Avenue /Amended Approval Notice
Saint Albans, NY 11412 /Section: Husband or wife of U.S. Citizen, 201(b) INA

Courtesy Copy: Original sent to : Becker, Eunice

This courtesy notice is to advise you of action taken on this case. The official notice has been mailed to the attorney or representative indicated above. Any relevant documentation included in the notice was also mailed as part of the official notice.

The above entitled has been approved. The petition indicates that the person for whom you are petitioning is in the United States and will apply for

adjustment of status. He or she should contact the local INS office to obtain Form I-485, Application for Permanent Residence. A copy of this notice should be submitted with the application.

If the person for whom you are petitioner decides to apply for a visa outside the United States based on this petition, the petitioner should file Form I-824, Application for Action on an Approved Application or Petition, with this office to request that we send the petition to the Department of State National Visa Center (NVC).

The NVC processes all approved immigrant visa petitions that require consular action. The NVC also determines which consular post is the appropriate consulate to complete visa processing. It will then forward the approved petition to that consulate.

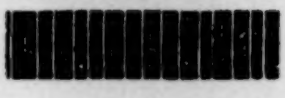
This courtesy copy may not be used in lieu of official notification to demonstrate the filing or processing action taken on this case.

THIS FORM IS NOT A VISA NOR MAY IT BE USED IN PLACE OF A VISA.

Please see the additional information on the back. You will be notified separately about any other cases you filed.

IMMIGRATION & NATURALIZATION SERVICE
VERMONT SERVICE CENTER
75 LOWER WELDEN STREET
SAINT ALBANS, VT 05479-0001

Customer Service Telephone: (800) 375-5283



IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-60130
Summary Calendar

KOMI ADJONKE
Petitioner

v.
MICHAEL B MUKASEY, US ATTORNEY GENERAL
Respondent

United States Court of Appeals
Fifth Circuit

FILED

November 28, 2007

Charles R. Fulbruge III
Clerk

Petition for Review of an Order of the
Board of Immigration Appeals
BIA No. A97 187 242

Before KING, DAVIS, and CLEMENT, Circuit Judges.

PER CURIAM:*

Togolese citizen Komi Adjonke petitions for review of the order of the Board of Immigration Appeals (BIA) that affirmed the decision of the Immigration Judge (IJ), to the extent that the IJ determined that Adjonke was not entitled to asylum, withholding of removal, or relief pursuant to the Convention Against Torture (CAT). Adjonke moves for leave to proceed in forma pauperis (IFP) on appeal and for appointment of counsel; those motions are denied.

No. 07-60130

Adjonke, who is proceeding pro se, contends that the IJ was biased against him and treated him unprofessionally. Adjonke did not raise his contention before the BIA and this court lacks jurisdiction to consider it. See Wang v. Ashcroft, 260 F.3d 448, 452-53 (5th Cir. 2001).

Adjonke challenges the IJ's credibility determinations, including the credibility determination based on a letter from the State Department indicating that nobody from two Togolese organizations had heard of Adjonke. The BIA adopted the IJ's decision only to the extent that the IJ determined Adjonke had failed to show his

*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.R. 47.5.4.

eligibility for relief; it did not adopt the IJ's credibility determinations. This court need not address the IJ's credibility determinations. See Mikhael v. INS, 115 F.3d 299, 303 (5th Cir. 1997). Moreover, the BIA did not consider the State Department letter; Adjonke's contention regarding the letter is moot.

Adjonke contents that the BIA erred by finding that he was not eligible for asylum, withholding of removal, or relief under the CAT. He argues that the facts of his case indicate that he was persecuted on account of his political beliefs and had a reasonable fear of persecution on return to Togo and that he satisfies the criteria for CAT relief. We will uphold the BIA's factual finding that an alien is not eligible for asylum if it is supported by substantial evidence. Chun v. INS, 40 F.3d 76, 78 (5th Cir. 1994). "This Court reviews factual findings to determine if they are supported by substantial evidence in the record." Roy v. Ashcroft, 389 F.3d 132, 138 (5th Cir. 2004).

We generally review the BIA's decisions "procedurally" to ensure that the complaining alien has received full and fair consideration of all circumstances that give rise to his or her claims." Abdel-Maseih v. INS, 73 F.3d 579, 585 (5th Cir. 1996). The BIA is not required to "address evidentiary minutiae or write any lengthy exegesis, [but] its decision must reflect meaningful consideration of the relevant substantial evidence supporting the alien's claims." Id.

No. 07-60130

The BIA does not indicate the evidentiary basis for its decision, other than to state that the IJ's decision set forth the facts asserted by Adjonke.

The IJ provided a brief of Adjonke's allegations and the testimony at his hearing and summarized some of the other evidence in the record. However, the IJ's decision was largely devoted to credibility determinations, and it did not mention much of the evidence in the record that appears to support Adjonke's claims. Neither the IJ nor the BIA discussed letter from Togolese opposition leaders appearing to bolster Adjonke's allegations regarding his position in the Togolese opposition movement. Moreover, neither the IJ nor the BIA discussed an Amnesty International report and other material in the record indicating that the political situation deteriorated markedly in 2005, an omission that is particularly noteworthy in light of the IJ's finding that the situation in Togo had improved somewhat in 2004. We are not convinced that Adjonke received full and fair consideration of the circumstances giving rise to his claims. See Abdel-Maseih, 73 F.3d at 585.

If Adjonke's allegations and all of the the evidence he provided are considered, and if they prove true, then it is conceivable that he can prove his asylum claim. It is possible that Adjonke suffered past persecution on account of his political views, see Adebisi v. INS, 952 F.2d 910, 913-14 (5th Cir. 1992), or that a reasonable person in the same circumstances would fear persecution if deported.

Jukie v. INS, 40 F.3d 747, 749 (5th Cir. 1994). We remand Adjonke's case to the BIA for a more thorough and complete examination of Adjonke's claims.

PETITON GRANTED; VACATED AND REMANDED; IFP MOTION DENIED; APPOINTMENT OF COUNSEL DENIED.

U.S. Department of Justice
Executive Office for Immigration Review
Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A28 319 026 – Harlingen Date: NOV 13 2006

In re: ROBERT RANDALL WATSON

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS: Sean D. Clancy
Assistant Chief Counsel

APPLICATION: Reopening

ORDER:

PER CURIAM. The respondent filed a motion to reopen on August 14, 2006. This case was last before us on March 22, 2006, when we denied the respondent's motion to reconsider our denial of his motion to reopen which we denied on November 10, 2005. We also denied a previous motion to reopen on March 4, 2005. On April 26, 2004, we dismissed the respondent's appeal of the Immigration Judge's denial of his motion to reopen deportation proceedings, which were conducted in absentia. The

Department of Homeland Security opposes the pending motion, which will be denied.

The respondent was ordered removed in absentia on February 5, 1988, and filed a motion to reopen with the Immigration Judge on November 26, 2002, more than 14 years later. In his current motion, the respondent makes essentially the same claims that were considered, and rejected, by the Board in our previous orders, which are incorporated herein by reference. The pending motion is both untimely and number barred, as his fourth motion to reopen. *See* 8 C.F.R. § 1003.2(c)(2) (2006). Further, no exceptions to, or equitable tolling of, the time restrictions for motion to reopen apply in the respondent's case. *See id.*; prior BIA Orders dated March 22, 2006, November 10, 2005, March 4, 2005, and April 26, 2004. Finally, we find that there is no basis to sua sponte reopen these proceedings. *See Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997). Given the multiple and repetitive filings of meritless motions, we will also deny the motion in the exercise of discretion. Accordingly, the pending motion is denied.

FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review
Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A28 319 026 – Harlingen Date: FEB - 6 2007

In re: ROBERT RANDALL WATSON

IN DEPORTATION PROCEEDINGS

MOTION

ORDER:

PER CURIAM. On February 5, 1988, and Immigration Judge issued a decision ordering the respondent deported after he failed to appear at a scheduled hearing. Fourteen years later, on November 26, 2002, the respondent filed a motion to reopen with the Immigration Judge, which was denied on January 27, 2003. The Board dismissed the respondent's appeal on April 26, 2004, agreeing with the Immigration Judge that the respondent failed to show reasonable cause for his failure to appear at the deportation hearing. We then denied 4 motions filed by the respondent. The respondent has now filed a motion to reconsider our latest decision of November 13, 2006. The Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) has not responded to the pending motion, which will be denied.

In *Matter of Cruz-Garcia*, 22 I&N Dec. 1155, 11557 (BIA 1999), the Board held that the regulation at 8 C.F.R. §1003.2(b)(4)(iii) (1998) imposes no time or numerical limitation on aliens seeking to reopen deportation proceedings conducted *in absentia* pursuant to section 242(b) of the Immigration and Nationality Act, 8 U.S.C. § 1252(b).[1] However, a decision to grant a motion to reopen is discretionary. *Matter of H-A-*, 22 I&N Dec. 728, 734 (BIA 1999); *Matter of Barrera*, 19 I&N Dec. 837, 844 (BIA 1989) ("An application to reopen is addresses to the sound discretion of the Attorney General.... a motion can be denied in discretionary grounds alone where there are significant grounds for denying reopening").

The respondent contended, in his motion presented to the Immigration Judge, that he had not received notice of the deportation hearing. The Immigration Judge, as noted, denied the motion, and we affirmed his decision, and thereafter denied 4 previous motions. Given the fact that the respondent's claims have already been addresses, we find it inappropriate to grant the pending motion, and it is, therefore, denied.

FOR THE BOARD

[1] The Board therefore acknowledges that its statement in the November 13, 2006, decision, that the motion was untimely and number-barred, was incorrect.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02 – 60226
Summary Calendar

NIHAD RAHMOUN,

Petitioner,

v.

JOHN ASHCROFT, U.S. ATTORNEY GENERAL,

Respondent.

- -

Petition for Review of an Order of the
Board of Immigration Appeals
BIA No. A76-955-431

- -

January 3, 2003

Before BARKSDALE, DeMOSS, AND BENAVIDES, Circuit Judges.

PER CURIAM:

Nihad Rahmoun petitions for review of the final order of the Board of Immigration Appeals dismissing his appeal from the Immigration Judge's order denying his motion to reopen deportation proceedings. He argues that the Board of Immigration Appeals erred in finding that his motion to reopen was untimely.

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Since the Board of Immigration Appeals conducted a review of the record and did not adopt the decision of the Immigration Judge in this matter, review is limited to the Board of Immigration Appeal's decision. *See Carbajal-Gonzales v. INS*, 78 F.3d 194, 197 (5th Cir. 1996). This court conducts a *de novo* review of the Board of Immigration Appeals's legal rulings, but will defer to the Board of Immigration Appeals's interpretation of immigration regulations if the interpretation is reasonable. *Lopez-Gomez v. Ashcroft*, 263 F.3d 442, 444 (5th Cir. 2001).

The Immigration Judge's authority to reopen is by regulation. Specifically, 8 C.F.R. § 3.23, entitles "Reopening or Reconsideration Before the Immigration Court," provides that an Immigration Judge "may upon his or her own motion at any time... reopen or reconsider any case in which he or she has made a decision." The Board of Immigration Appeals, in failing to rule on the Immigration Judge's findings with regard to the motion and in finding that Rahmoun's motion was untimely, effectively read out of 8 C.F.R. § 3.23 the Immigration Judge's inherent power to *sua sponte* reopen an immigration proceeding at any time. Such a reading of 8 C.F.R. § 3.23 is unreasonable. *Lopez-Gomez*, 263 F.3d at 444. Accordingly, Rahoum's petition for review is GRANTED and the matter is VACATED and REMANDED to the Board of Immigration Appeals so the Board of Immigration Appeals can address whether the Immigration Judge erred in failing to *sua sponte* reopen the immigration proceeding on the grounds advanced by Rahmoun.

PETITION FOR REVIEW GRANTED; VACATED AND REMANDED.

U.S. Department of Justice
Executive Office for Immigration Review
Immigration Court
201 E. Jackson
Harlingen, Texas 78550
Phone: (956) 427-8582

RE: A 28-319-026

Name: Robert Randall Watson

Address: 195-14 Hollis Avenue

City: St. Albans, NY 11412

Date: August 5, 2005
Certified Mail
#7160 3901 9841 35633 5645

Receipt of Document(s) Cancelled and Returned

Any receipt is cancelled and the following written material is returned, as checked below:

□ Form EOIR 28; Application Form: □ EOIR 40
□ EOIR 42A □ EOIR 42B □ EOIR_____
Application Form: □ I-191 □ I-485 □ I-589 □ I-601
□ I-864 □ I-_____
□ Letter □ Supporting Documents □ Other_____
Motion to: □ administratively close □ abandon relief
□ change venue □ continue □ consolidate □ extend
□ recalendar ☑ reconsider/reopen □ stay
□ stipulate □ substitute □ telephonic hearing

□ terminate □ waive appearance □ waive filing fee
□ withdraw □ _____

Reason(s) for Cancellation and Return

Cancellation and return is made for the reason(s) checked below. Follow the referenced regulation and any instructions carefully. Resubmitted documents *must* be re-served.

□ Correspondence was filed with the wrong Immigration Court. Administrative control (custodial responsibility) is with the Immigration Court in _____, and all documents and correspondence must go to that Court.
□ Alien's A-number is not on the document, or it is incorrect.
□ Charging document has not been filed by DHS with this Court.
□ Records regarding the case have not been located under the alien's name and A-number provided.
□ Voluminous exhibits are not indexed, paginated, and accompanied by a table of contents.

□ Document(s) not properly on 8 ½" x 11" size paper.
□ Facsimile (fax) was not authorized.
□ Case is currently closed.
□ Foreign language document was not accompanied by a certified English translation.
□ Motion for change of venue cannot be considered without identification of a fixed street address where respondent may be reached for further hearing notifications.

☐ Notice of Entry of Appearance as Attorney or Representative Before the Immigration Court (Form EOIR-28) was not submitted or is incomplete.
☐ Payment of the filing fee, to DHS before filing documents, is not proven; alternatively, there is no written "Fee Waiver Request" accompanied by the alien's affidavit or declaration.
☐ Service of the submitted document(s) on the opposing party is incomplete or improper. If serving the DHS by mail to: District Counsel, DHS, P.O. Box 1711, Harlingen, TX 78551; If serving by overnight express service to: District Counsel DHS, 1709 Zoy Street, Harlingen, TX 78552.
☐ File was received following a Motion to Change Venue where the Order of the Immigration Judge does not comply with OPPM 01-02.
☑ Other: Jurisdiction is with Board of Immigration Appeals.

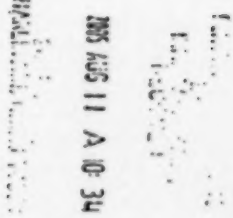
Money order must be paid to DHS.

Celeste Garza
Court Administrator

Sent by: Robert Bernal
Clerk

Attachment
Money order must be paid to DHS

Robert R. Watson
195-14 Hollis Ave
St. Albans
New York 11412



Re: A 28319-026

To: Ms. Celeste Garza.

Court Administrator

Hello Ms. Garza, this is a continuation of our conversation on 08/09/2005. I had submitted a motion to Rescind, Reconsider and Reopen and order of deportation entered in absentia by an Immigration Judge. You returned the motion to me with the notation . "Jurisdiction is with the Board of Immigration Appeals."
I beg to disagree and I have enclosed documents which reflect my opinion. Even though I figured my interpretation of the relevant statutes was correct I followed your directive and sent the Motion to the B.I.A., but the Federal Regulations states that where an order of deportation is issued in absentia there is

no direct appeal with the B.I.A. The motion to reopen must be with the Immigration Judge and then one can appeal the Immigration Judge's decision to the B.I.A.

My motion to the Immigration Judge is not time or numerically barred as per regulations at 8 C.F.R. § 3.23(b)(4)(iii) (1998),imposes no time or numerical limitation on Aliens seeking to reopen deportation proceedings conducted in absentia pursuant to section 242 (b) of the I+N Act.. 8 U.S.C. § 1252 (b) 1988. Matter of Mancera 22 I + N Dec. 79. BIA 1998 Reaffirmed.

I am in a quandary as I did follow your directive and mailed the Motion to the B.I.A. I am convinced that the B.I.A. will summarily dismiss the motion. I am open to suggestions on how to correct the situation. Is there a number at the B.I.A. that I could call to redirect the motion to the Immigration Court, or if you are right could you cite the relevant precedent or Code of Federal Regulations.

Your patience on the telephone was deeply appreciated. Thanks.

Robert R. Watson

08/09/2008

Tel. 347-996-1847

One Commenter suggested that the in absentia hearing provisions in section 242B restrict only motions to reopen and judicial review and do not bar the timely filing of a notice of appeal on the merits of the case where a respondent received notification of the in absentia order prior to expiration of the time to file an appeal. The commenter advocated allowing direct appeals under such circumstances.

Commenters also objected to section 3.23(b)(4)(iii), formerly section 3.23(b)(6), which specifies under what circumstances an order of deportation entered in absentia may be rescinded. They noted that the rule makes no provision for rescission of an order of exclusion entered in absentia.

Response and Disposition: With regard to in absentia hearings under section 242B(c) of the Act, the commenters are correct that the statute only applies to deportation hearings and does not apply to in absentia exclusion hearings and, further, that appeals from orders entered following such exclusion hearings should be allowed. Therefore, the provision in section 3.1(b)(1) of the proposed regulation that stated that "no appeal shall lie from an order of exclusion entered in absentia" has been removed. An appeal from an order of exclusion entered in absentia is permissible but must be filed within the time limit for appeals set by section 3.38(b).

Further, an alien may file a motion to reopen exclusion proceedings to rescind an order of exclusion entered in absentia. Such a motion must

be supported by evidence that the alien had reasonable cause for his failure to appear at the exclusion hearing. This provision is consistent with the Board's decision in *Matter of Haim*, 19 I&N Dec. 641 (BIA 1988).

The rule retains the provision prohibiting an appeal to the Board from an Immigrations Judge's order of deportation entered in absentia. Congress restricted review of deportation orders entered in absentia in section 242B of the Act by providing that such orders may only be rescinded by filing a motion to reopen with the Immigration Judge. *See* section 242B(c)(1) of the Act; *Matter of Gonzalez-Lopez*, Interim Decision #33198 (BIA 1993). Further, the Board has confirmed that sections 3.1(b) and 3.3 allow an alien to appeal to the Board from an Immigration Judge's denial of such a motion to reopen an in absentia decision. *Matter of Gonzalez-Lopez* at 4. in addition to restricting the manner in which an in absentia order of deportation may be rescinded, Congress delayed eligibility for most forms of relief from asylum, withholding of removal.

(ii) I*n absentia proceedings*. - There are special rules pertaining to motions to reopen following an alien's failure to appear for a hearing. An "in absentia" order (an order entered when the alien did not come to the hearing) cannot be appealed to the Board. *Matter of Guzman*, 22 I&N Dec. 722 (BIA 1999). If an alien misses a hearing and the Immigration Judge orders the alien removed from the United States, the alien must file a motion to

reopen with the Immigration Judge, explaining why he or she missed the hearing. (Unlike the in absentia order, the Immigration Judge's ruling on the motion can be appealed.) Such motions are subject to strict deadlines under certain circumstances. See 8 C.F.R. §§ 1003.2(c)(3)(i), 1003.23(b)(4)(ii), 1003.23(b)(4)(iii).

(iii) *Joint motions.* – Motions that are agreed upon by all parties and are jointly filed are not limited in time or number. See 8 C.F.R. § 1003.2 (c)(3)(iii).

(iv) *DHS motions.* – For cases in removal proceedings, DHS may not be subject to time and number limits on motions to reopen. See 8 C.F.R. § 1003.2(c)(2), (3). For cases brought in deportation or exclusion, DHS is subject to the time and number limits on motions to reopen, unless the basis of the motion is fraud in the original proceeding or a crime that would support termination of asylum. See 8 C.F.R. § 1003.2(c)(3)(iv).

(v) *Pre-9/30/96 motions.* – Motions filed before September 30, 1996, do not count.

However, this Board is also bound by the statutes enacted by Congress. See Matter of Valdovinos, 13 I & N Dec. 343 (BIA 1982), and cases cited therein. Where a federal statute and a regulation conflict, the statute controls. In fact section 242(b) of the Act, 8 U.S.C. § 1252(b) (1994), specifies that the controlling regulations in deportation proceedings must be consistent with the Act. It states that "proceedings before a special inquiry officer acting under the

provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe."

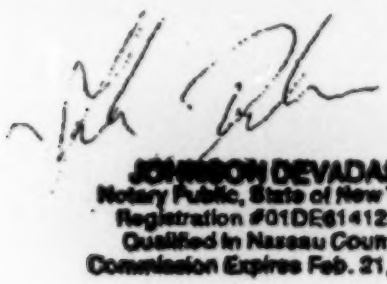
AFFIDAVIT

I Robert Watson, declare under the risk of perjury that the following declarations are true and accurate to the best of my knowledge.

(1) I did not receive or was aware of the Hearing Notice for my deportation proceedings.
(2) I did not receive Oral Notice of the consequences of the failure to appear at the deportation hearing.
(3) I did inform Mr. Pena of my change of address.
(4) I had relief in the form of Labor Certification filed. (filed 09/02/1987 approved 08/08/1989)
(5) I have admitted deportability due to the fact that I entered without inspection.
(6) I am stipulating to the veracity of all allegations in the OSC.
(7) A complete application for adjustment of status is on file with the BIA. filed 08/19/2008, (see exhibit I).
(8) My stay at the first address was very brief, I did not send or receive any mail while I was there, so I did not think it was necessary for me to leave a forwarding address.
(9) I am not the subject of any criminal proceedings.

Yours Truly.

State of New York
County of Queens
Sworn To Before Me
This 12th Day Of August 2006



JOHNSON DEVADAS
Notary Public, State of New York
Registration #01DE6141232
Qualified in Nassau County
Commission Expires Feb. 21, 2010

Board of Immigration Appeals.

To the honorable Judges, I'm attempting to disclose facts which may be pertinent to my appeal. My daughter Alexis was borned twenty three weeks and five days, weighing 1.25 lbs. The Doctor informed us that she would not survive. She received no assistance, no oxygen, she wasn't even placed in an incubator. She was just left to die. My wife hugged and massaged our baby fervently. We kept Alexis with us as we planned her funeral for the following day, desiring to put this painful and tragic incident behind us.

I told the nurse that we had finished saying goodbye, she took Alexis and proceeded towards the morgue. A shortwhile later that same nurse indicated that she wanted to speak with me privately. It was good news, she said that on the trip to the morgue Alexis had raised her arms through the blanket, and she was taken to the I.C.U., but the prognosis was not good. Well it was time to pray and the entire family did. The pain and agony of seeing ones daughter spreadeagled with wires and tubes all over her little body was excruciating, but with each passing day we became more hopeful.

She was transferred to the New York Presbyterian Hospital where she stayed for approximately five months. The Doctors and Nurses in the Pediatric Department were the absolute best, thanks to them and the mercy of the Almighty God Alexis celebrated her third birthday last month.

Alexis has several health issues related to her extreme prematurity, her speech is severely delayed, she has been diagnosed as being retarded and her eyesight is compromised due to the length of time she spent on the ventilator; although faced with all these problems Alexis is a very happy child. She is responding very well to the great love and care which she receives from us. Alexis had in home therapy until she was three years old. The therapy is now included in her curriculum in school.

Alexis came home from the hospital hooked up to a portable pulse oximiter/oxygen saturation machine. I took off from work and Vena and I stayed awake in shifts ensuring that the monitor was always monitored. Eventually Vena went back to work and I officially became Mr. Mom. I can recall numerous instances when I was the only male in the doctors' waiting room. I'm not complaining, I'm just terrified that I may not be around to contribute both emotionally and financially towards her care. Alexis will probably require special care for a very long time.

Caring for Alexis took a great toll on us financially, especially Vena, seeing that only one of us could work. During this period our income was greatly reduced, our mortgage went into foreclosure twice. Vena had to raid her I.R.A. to save our home. Her credit ratings was severely damaged because all the bills were being paid later and later every month.

Your Honors these were difficult and trying times but the the immense joy and love we experienced with our precious daughter is well worth it. We own a small trucking outfit which I operate, with the new regulations in place it's become very difficult for me to obtain work. Given the opportunity to adjust my status I could generate more than enough revenue to facilitate a very comfortable situation for my family.

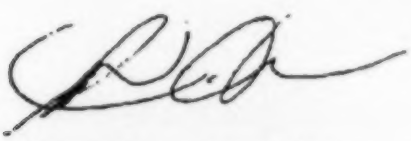
I am making this personal appeal, unorthodox as it may seems, because I'm sure some members of the committee if not all are parents and will probably understand the fear and trepidation of being forcibly separated from your wife and child especially your daughter. I'm forty five years old and I have only one child, this was no accident. I firmly believe that a child should be raised by both parents in a matrimonial setting.

Included the names of two therapists Alexis at home and would be aware of the close bond between us. Mrs. Jadqueline L. Pierce tel. 917 699-6298 and Mr. Zuben. Tel. 516 287-0241. If you ask someone for a testimonial they surely will write only what they think you would like to hear, but I think you would be interested in the unvarnished truth. They are unaware of my situation and if you should contact them I'm confident that you will elicit germane information without divulging my status.

Thanks for reading my letter and I'm praying and hoping that there will be a positive outcome to my case. In ending I will borrow some lines from

Joseph Addison to express my feelings for my daughter.

> Certain it is that there is no kind of affection so purely angelic as that of a father to a daughter. He beholds her both with and without regard to her sex. In love to our wives there is desire, to our sons there is ambition, but in that to our daughters there is something which there are no words to express.



ROBERT WATSON.

APPLE
A Preschool Program for Learning and Enrichment
QUEENS CENTERS FOR PROGRESS
82-25 164th Street - Jamaica, NY 11432
(718) 374-0002 - Fax: (718) 380-3214

CHILD'S NAME: Alexis Watson
DATE OF BIRTH: 9/8/01 .

THE FOLLOWING THERAPY(IES) ARE RECOMMENDED:

✓ OCCUPATIONAL THERAPY
✓ PHYSICAL THERAPY
✓ SPEECH THERAPY

11/11/04

PHYSICIAN'S SIGNATURE

K.K. GUPTA, M.D., F.A.A.P.
214-08 HILLSIDE AVE.
QUEENS VILLAGE, N.Y. 11427
(PLEASE PRINT) PHYSICIAN'S NAME) 217-8202

Jf/eh
F:/FORMS/THERAPYLTR.O3

CHILDREN'S CENTRAL/APPLE
QUEENS CENTERS FOR PROGRESS
82-25 164th Street
Jamaica, NY 11432
(718) 347-0002, Ext. 471

Date: October 12, 2004

Dear Physician:

In order for Alexis Watson to continue receiving physical, occupational and/or speech/language therapy, a prescription is needed.

Please complete the attached form.

Thank you for your prompt attention to this matter.

Sincerely,

Eileen Fontanetta, M.D.

Eileen Fontanetta, M.D.

EF/ps

f:/DrPrescriptionReq.ltr.wpd

NOV 08 2004

QUEENS CENTER FOR PROGESS
Apple Program
82-25 164th Street
Jamaica, NY 11432
718-374-0002 Fax: 718-380-3214

Date: 11/4/04

Dear Parents,

In order for us to keep an up-to-date record, in case of emergencies, could you please provide a list of all medications that your child takes at home.

If you have any questions, please feel free to call us at 718-374-0002, ext. 469.

Thank you for your assistance.

Sincerely,

Medical office

Child's Name Alexis Watson
Parent's Name Robert & Vena Watson

Medications taken at home:
Albuterol via nebulizer
Pulmocort
□ Check this box if no medications is taken at home.
Date 11/4/04
PLEASE RETURN TO NURSES
CH:ps
f:/HomeMeds.form.wpd

pb (2)

No. 08-8

Supreme Court, U.S.
FILED
OCT 20 2008
OFFICE OF THE CLERK

In the Supreme Court of the United States

ROBERT R. WATSON, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly affirmed the Board of Immigration Appeals' denial of petitioner's motions to reopen his deportation proceeding from 1988, in which he was ordered deported *in absentia* after failing to appear for a duly noticed hearing, for consideration of his application for adjustment of status.

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In the Supreme Court of the United States

No. 08-8

ROBERT R. WATSON, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-4a) is not published in the *Federal Register* but is reprinted at 255 Fed. Appx. 920. The decisions of the Board of Immigration Appeals (Pet. App. 26a-29a) and the immigration judge (Pet. App. 14a-17a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 2007. A petition for rehearing was denied on January 25, 2008 (Pet. App. 1a). The petition for a writ of certiorari was filed on April 24, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a native and citizen of Jamaica who, on June 30, 1986, entered the United States illegally near Los Ebanos, Texas. That same day he was apprehended by immigration authorities. A day later, he was charged with being deportable from the United States under 8 U.S.C. 1251(a)(2) (1986) as an alien who had entered the United States without being admitted or inspected by immigration officers. Pet. App. 5a-9a. The charging document, which was personally served on petitioner, also informed petitioner that the time and date of his deportation hearing would be set later (*id.* at 6a) and further warned him that failure to attend the hearing at the time and place so designated may "result in a determination being made by the Immigration Judge in your absence" (*id.* at 7a-8a). Petitioner was released from custody on his own recognizance. *Id.* at 8a.

Eight days after petitioner's release, petitioner's attorney entered an appearance with the immigration court in Harlingen, Texas. Two days after that, petitioner's attorney filed a notarized affidavit, signed by petitioner, in which petitioner admitted the allegation of deportability and requested a change of venue to Brooklyn, New York. A.R. 747-748; Pet. App. 14a. The affidavit indicated that if the request for a change of venue was granted, petitioner's address (for an apartment in Brooklyn, New York) would remain as listed in the charging document. A.R. 747.

On December 1, 1987, the immigration court sent a Notice of Master Calendar Hearing by priority via Western Union to petitioner's attorney, advising him that petitioner's deportation hearing was scheduled for December 9, 1987. A.R. 749. The letter was returned on December 5, 1987, bearing the stamp "moved left no ad-

dress." A.R. 745. On December 9, 1987, the immigration court prepared a Notice of Rescheduled Master Calendar Hearing, advising that petitioner's hearing was being rescheduled for February 3, 1988, and sent it to petitioner at the Brooklyn address that he had provided, as well as to petitioner's attorney. A.R. 746. On December 14, 1987, both notices were returned by the U.S. Postal Service to the immigration court marked "moved—not forwardable" and "moved left no address," respectively. A.R. 740, 742.

On February 3, 1988, when petitioner failed to appear at his hearing, the immigration judge (IJ) proceeded *in absentia* under 8 U.S.C. 1252(b) and found that petitioner's deportability had been established.[1] In a final order of deportation issued two days later, the IJ ordered petitioner deported to Jamaica. A.R. 738. In a Memo to File, the IJ noted that petitioner's attorney had been disbarred in Texas in September 1987, but that "[p]rior to [his] actual disbarment, the Court had for many months sent notices in duplicate, to him and to his clients, as notices to [him] were being consistently returned by the post office with notations that he had moved without leaving a forwarding address." A.R. 743. The immigration court mailed a copy of the IJ's decision to petitioner at the Brooklyn address that petitioner had provided. A.R. 736. That decision also was returned as "moved - not forwardable." A.R. 737.

2. a. In November 2002, more than 14 years later, petitioner, through new counsel, moved to reopen the

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[1] Section 1252(b) provided for conducting deportation hearings and issuing deportation orders *in absentia* when an alien failed to attend a scheduled hearing if the alien had been given a reasonable opportunity to be present and, without reasonable cause, failed or refused to attend. 8 U.S.C. 1252(b) (1988).

deportation proceeding to apply for adjustment of status under 8 U.S.C. 1255(i).[2] A.R. 713-716. In the motion, petitioner asserted that he is the beneficiary of an I-130 immediate-relative visa petition filed by his United States citizen wife that had been approved four months earlier. A.R. 714-715. Petitioner's wife, a lawful permanent resident alien at the time of their marriage in 1996, became a naturalized United States citizen in February 2001. A.R. 715.

In his motion to reopen, petitioner also claimed that he did not receive notice of the February 1988 hearing. Petitioner asserted that the Brooklyn address he pro-

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[2] The statute authorizing the Attorney General to adjust the immigration status of aliens provides:

> The status of an alien *who was inspected and admitted or paroled into the United States* * * * may be adjusted by the Attorney General * * * to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

8 U.S.C. 1255(a) (emphasis added). In 1994, Congress amended Section 1255 to permit certain aliens (like petitioner) who had entered without inspection to seek adjustment to lawful permanent resident status upon payment of a surcharge. 8 U.S.C. 1255(i) (1994); see Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-317, § 506(b), 108 Stat. 1765-1766. Congress has twice extended and amended Section 1255(i), authorizing the adjustment of the status of aliens who (as relevant here) were the beneficiaries of a visa petition filed on or before April 30, 2001. See LIFE Act Amendments of 2000, Pub. L. No. 106-554, § 1502(a)(1), 114 Stat. 2673A-324.

Under regulations promulgated by the Attorney General, after an alien is in deportation proceedings, his application for adjustment of status "shall be made and considered only in those proceedings." 8 C.F.R. 245.2(a)(1) (2002).

vided was the address of a friend's home where petitioner had resided, and that the friend either did not receive the notice or did not notify petitioner of its receipt. A.R. 713. In an affidavit, petitioner stated that, after being released from Immigration and Naturalization Service (INS) custody in July 1986, he "returned to the New York area where I have resided ever since. I never heard from the [INS] again about a hearing date and I learned that I was order[ed] deported in absentia on February 3, 1988." A.R. 715. The affidavit provided no information as to what petitioner's address had been in the "New York area" during the relevant time period, and no statement from the persons who resided at the Brooklyn address that petitioner had provided to the immigration court.

In January 2003, the IJ denied the motion to reopen. Pet. App. 14a-17a. The IJ noted that petitioner had filed an affidavit (A.R. 747) with the immigration court in 1986, before his 1988 deportation hearing, in which he acknowledged that he was in deportation proceedings, admitted that he was deportable as charged, and requested no relief from deportation. Pet. App. 14a-15a. The IJ also found that petitioner had filed no separate application for relief or protection under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, before the 1988 *in absentia* hearing. *Ibid.*

The IJ concluded that petitioner "has not demonstrated that he had reasonable cause for his failure to appear at the hearing," based on the IJ's findings that (1) proper notice was sent to the last known address of both petitioner and his counsel; (2) both of those notices were returned by the United States Postal Service as undeliverable; (3) petitioner did not contend that he had advised either the immigration court or the former INS

of any change of address for him before his 1988 deportation hearing; and (4) petitioner failed to show that he did not receive that notice. *Id.* at 15a-16a. The judge also noted that petitioner's motion was untimely because it was not filed by September 30, 1996—the deadline for filing motions to reopen deportation proceedings.[3] *Id.* at 17a.

In April 2004, the Board of Immigration Appeals (Board) affirmed. A.R. 681. The Board found that petitioner had failed to submit a change of address when he moved; that the hearing notice was properly sent to petitioner's last known address; and that petitioner "has not explained why he waited 14½ years to seek reopening." *Ibid.* Petitioner did not seek judicial review.

b. Thereafter, petitioner filed five motions requesting the Board to reopen his proceeding and to reconsider its decisions denying reopening. In each motion, petitioner renewed his claim that he did not receive notice of his 1988 hearing and requested that his deportation proceeding be reopened to permit him to apply for adjustment of status. The following is a summary:

(1) In January 2005, petitioner filed a motion to reopen in which he claimed that he did not receive notice of the February 1988 hearing as a result of ineffective assistance of his prior counsel. A.R. 599. He admitted

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[3] In May 1996, following a Congressional mandate to establish a temporal limit on filing motions to reopen deportation proceedings, the Attorney General promulgated regulations generally providing that a motion to reopen a proceeding "must be filed not later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened, or on or before September 30, 1996, whichever is later." See *Executive Office for Immigration Review; Motions and Appeals in Immigration Proceedings*, 61 Fed. Reg. 18,908 (adding new 8 C.F.R. 3.23(b)(4)(i)).

that the hearing notice was in fact sent to the Brooklyn address he had provided in his affidavit (A.R. 747) but argued that, because he "had already moved to New York by the time of the notice's mailing, he did not, nor could he, receive the notice" sent to his prior counsel. A.R. 601.

The Board denied the motion. It ruled that the motion was untimely to the extent it was considered a motion to reconsider, and that the motion exceeded numerical limits to the extent it was considered a motion to reopen. A.R. 591. It also determined that petitioner "ha[d] not established that sua sponte reopening [was] warranted due to any ineffective assistance [of] former counsel or for any other reason." *Ibid.* Finally, the Board also found that none of the exceptions available under 8 C.F.R. 1003.2(c)(3) to the time and number restrictions for motions to reopen or reconsider applied. A.R. 591. Petitioner did not seek judicial review.

(2) In August 2005, petitioner filed a motion to "Rescind, Reconsider and Reopen." A.R. 326. He admitted that the notice of the hearing had been sent to the address where he "previously resided," but gave no explanation as to why he did not receive the notice, and he renewed his claim that he had been provided ineffective assistance of counsel. A.R. 329.

The Board denied the motion. It found that petitioner's contentions had been addressed by the IJ in the January 2003 decision denying reopening (A.R. 699-701), and that they were "essentially the same claims that were considered and rejected by the Board" in its prior decisions. A.R. 189. Specifically, the Board held that petitioner "failed to show reasonable cause for his failure to appear at the deportation hearing." *Ibid.* Petitioner did not seek judicial review.

(3) In December 2005, petitioner filed a motion to reconsider. A.R. 164. In March 2006, the Board denied that motion. It held that the "motion fails to offer new arguments based on a substantial change in law or otherwise establish an error of fact or law in our decision [that] would affect the result in this case." A.R. 160. Recapping its findings in prior decisions, the Board explained:

> [Petitioner] was aware that he was in deportation proceedings and he retained an attorney to represent him. Even if we presume that [petitioner] provided a change of address to that attorney * * * who was disbarred, and we also presume that [petitioner] was ineffectively represented by * * * [that attorney] as a result of his failure to submit the change of address to the immigration court, [petitioner] waited more than 14 years before taking any steps to reopen his case.

Ibid. The Board concluded that "[petitioner's] failure to make any attempt to contact the immigration court about the status of his case for that length of time does not warrant reopening of his case." *Ibid.* Petitioner timely petitioned for judicial review of this ruling.

(4) In July 2006, petitioner filed another "Motion to Reopen, Rescind and Change Venue." A.R. 93. In November 2006, the Board denied that motion, noting that petitioner "makes essentially the same claims that were considered, and rejected, by the Board in our previous orders, which are incorporated herein by reference." Pet. App. 27a. The Board further noted that the motion was untimely and numerically barred, and that there was no basis for equitable tolling or for *sua sponte* re-

opening petitioner's case. *Ibid.* Petitioner timely petitioned for judicial review of the decision.

(5) In December 2006, petitioner filed yet another motion to reconsider. A.R. 11. In February 2007, the Board denied the motion. Pet. App. 28a-29a. The Board noted that its statement in its preceding decision that petitioner's motion was time-barred and number-barred was incorrect in view of another Board decision holding that regulations imposing temporal and numerical limitations on motions to rescind *in absentia* removal orders issued pursuant to 8 U.S.C. 1252b (1994) do not apply to deportation proceedings that, like petitioner's, were conducted under former 8 U.S.C. 1252(b) (1988). *Id.* at 29a (citing *In re Cruz-Garcia*, 22 I. & N. Dec. 1155, 1157 (B.I.A. 1999), aff'd, 229 F.3d 1137 (3d Cir. 2000) (Table)). On the merits, however, the Board stated that a decision to grant a motion to reopen rests in the sound discretion of the Board and that it had addressed petitioner's claims in its decisions denying petitioner's four prior motions. *Ibid.* Petitioner petitioned for judicial review.

3. The court of appeals consolidated the three petitions (which sought review of the Board's denials of motions (3), (4), and (5)) and, in an unpublished, per curiam opinion, dismissed in part and denied in part. Pet. App. 2a-4a. It dismissed the petition for review of the Board's February 2007 decision for lack of jurisdiction because the petition was filed late. *Id.* at 3a. It denied on the merits the petitions for review of the March 2006 and November 2006 decisions. *Id.* at 3a-4a. The court determined that petitioner had failed to show any error in the Board's determination that lack of actual notice, where the government properly mailed notices of the deportation hearing to petitioner's last known address,

did not constitute reasonable cause for failure to appear. *Id* at 4a. Accordingly, it held that petitioner failed to demonstrate that the Board abused its discretion in denying his motions to reopen and reconsider. *Ibid.*

ARGUMENT

Petitioner argues that the court of appeals erred in holding that the Board did not abuse its discretion in denying his motions to reopen a deportation proceeding from 1988 that resulted in an *in absentia* deportation order, on the ground (*inter alia*) that he was not advised to inform the immigration court of address changes and that he did not actually receive notice of the hearing. The court of appeals' unpublished decision does not conflict with any decision of this Court or of another court of appeals and does not otherwise warrant review by this Court. Moreover, petitioner's motions to reopen, which likely were untimely, were subject to the Board's broad discretion, and there is no good reason to question the exercise of that discretion on the facts of this case. Accordingly, no further review is warranted.

1. As this Court has emphasized, due to the government's strong interest in the finality of deportation orders, the Attorney General's discretion in deciding whether to reopen a completed removal proceeding is very broad, and judicial review of denials of such motions is correspondingly narrow. See *INS* v. *Doherty*, 502 U.S. 314, 322-323 (1992). A motion to reopen is comparable to a motion for a new trial in a criminal case on the basis of newly discovered evidence, "as to which courts have uniformly held that the moving party bears a heavy burden." *INS* v. *Abudu*, 485 U.S. 94, 110 (1988). And the Board's broad discretion permits it to deny motions to reopen for reasons wholly distinct from the mer-

its of the alien's eligibility for the relief to be sought at a reopened proceeding. *Id.* at 106-107.

Here, the Board identified several reasons for denying reopening, including its determinations that petitioner: (1) failed to establish that the hearing notice was not properly sent to his last known address; (2) failed to establish his claim that his failure to appear at the hearing was attributable to the ineffective assistance of his counsel; and (3) failed to justify the 14-year-long period of delay between the time that he was ordered deported *in absentia* and the time that he moved to reopen his removal proceeding. See Pet. App. 27a (incorporating by reference all the reasons it previously gave for denying reopening and reconsideration). Indeed, it was not until after petitioner became the beneficiary of an approved visa petition and a potential recipient of an immigration benefit that he made his whereabouts known to immigration authorities and submitted himself to the jurisdiction of the immigration court. Taken together, those reasons demonstrate that the Board did not abuse its discretion in declining to reopen proceedings. The Board's reasonable and factbound determination does not warrant this Court's review.

In addition, petitioner did not seek judicial review of the Board's decision affirming the IJ's denial of his first motion to reopen the deportation order entered in 1988 See p. 6, *supra*. All of the five subsequent motions petitioner filed, including the two that were before the court of appeals, were *successive* motions that presented no grounds different from those presented in the first motion, which petitioner allowed to become final and unreviewable. The Board was not required to reopen its now 20-year-old decision in response to such successive motions.

Finally, the premise of petitioner's petition—that the procedural requirements set forth in 8 U.S.C. 1252b (1994) were applicable to his deportation proceeding—is incorrect. Petitioner asserts that the charging document served upon him was deficient because, contrary to Section 1252b, the government did not advise him of the change-of-address requirement and did not provide him notice of the date of hearing "by certified mail if personal service was not possible." Pet. 10. But Section 1252b was not enacted until 1990, *after* petitioner had been ordered deported. See Immigration Act of 1990 (1990 Act), Pub. L. No. 101-649, § 545(a), 104 Stat. 5061. Petitioner's case was instead governed by 8 U.S.C. 1252(b) (1988), which did not prescribe a change-of-address warning or a specific method of notice. Rather, at that time, the INA directed the Attorney General to provide by regulation that the alien "be given notice, reasonable under all the circumstances, * * * of the time and place at which the proceedings will be held." 8 U.S.C. 1252(b)(1) (1988).

Even assuming some defect in the government's notice, petitioner cannot demonstrate prejudice from any such defect. As of February 1988, petitioner had no apparent grounds on which to challenge his deportability or obtain any form of relief that would have permitted him to remain permanently in the United States. Notably, before the hearing, petitioner had admitted that he was deportable as charged, and requested no relief or other protection from deportation. Pet. App. 14a-15a. Accordingly, there is no reason to believe that, had peti-

tioner appeared, the outcome of the deportation proceeding would have been any different.[4]

2. The court of appeals' unpublished decision does not establish circuit precedent that could give rise the sort of circuit conflict that might warrant review by this Court. In any event, contrary to petitioner's contention (at 12-14), the Fifth Circuit's decision in this case does not conflict with any decision of another court of appeals.

In *Lahmidi* v. *INS*, 149 F.3d 1011 (1998), on which petitioner relies, the Ninth Circuit concluded that the Board abused its discretion in denying a motion to rescind an *in absentia* order—entered in accordance with the post-1990 Act, § 545(a), 104 Stat. 5061, procedures set forth in 8 U.S.C. 1252b—for an alien who had not received notice and had not been advised to update his address. The Ninth Circuit held that, because the alien had been charged before the 1990 Act's effective date, the Board had erred in applying the Act's procedures in the first place. *Lahmidi*, 149 F.3d at 1016. In this case, by contrast, petitioner's deportation proceeding started and finished before the Section 1252b procedures went into effect, and there is no contention that the IJ or

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[4] Asserting that he had obtained a labor certification, petitioner now argues that he had "initiated proceedings to obtain [a] benefit which made it less likely that I would simply ignore [a] later immigration proceeding of which I had notice." Pet. 25. An approved labor certification, however, establishes only that an alien is not inadmissible under 8 U.S.C. 1182(a)(5)(A)(i) (requiring certification from the Secretary of Labor that there are not sufficient workers skilled to perform the particular type of labor sought to be performed by the alien), not that an employment-based immigrant visa is immediately available to the alien. See *United States* v. *Ryan-Webster*, 353 F.3d 353, 355-356 (4th Cir. 2003). In any event, the record does not support petitioner's assertion.

Board applied the wrong statutory regime. Moreover, the time lag between the deportation order and the motion to reopen was considerably less in *Lahmidi* than the 14-year lag present here. *Id.* at 1012. Finally, there is no indication that, like petitioner here, the alien in *Lahmidi* was seeking an adjustment of status based on a development that arose long after the fact, rather than seeking to challenge the underlying basis of his deportation order. That distinction is meaningful because it bears on whether notice would have made any substantive difference (p. 12, *supra*) and on the timeliness of the motion to reopen (pp. 15-16, *infra*).

Petitioner also alleges a conflict with decisions of the Seventh Circuit. See Pet. 12-14 (citing *Sabir* v. *Gonzales*, 421 F.3d 456 (7th Cir. 2005); *Joshi* v. *Ashcroft*, 389 F.3d 732 (7th Cir. 2004); and *Chowdhury* v. *Ashcroft*, 241 F.3d 848 (7th Cir. 2001)). None of those decisions, however, conflicts with the ruling below.

In *Sabir*, which involved an *in absentia* removal order entered under a subsequent statutory regime, the court of appeals held that the IJ had abused his discretion in concluding that the alien had thwarted delivery of notice of his hearing by changing the spelling of his name on his mailbox, pointing out that the address on the mailbox was correct and the mail was properly addressed. 421 F.3d at 459. Here, by contrast, petitioner does not claim that he had provided an address that was valid at the time the notice was delivered. And, unlike here, the alien in *Sabir* had filed his motion to reopen "immediately" after the removal order. *Id.* at 457.

In *Joshi*, also involving an *in absentia* removal order entered under a subsequent statutory regime, the court of appeals held that the Board had not properly considered evidence probative of the issue of whether the alien

had received notice of her scheduled removal hearing, and it remanded for a further explanation. 389 F.3d at 736-737. Here, by contrast, there was no claim before the court of appeals that the Board overlooked or failed to adequately consider the evidence that petitioner submitted. And, once again, the motion to reopen in *Joshi* followed the removal order in a much more timely fashion, and there is no indication that the alien there had sought adjustment of status based on an after-the-fact development. 389 F.3d at 733.

Finally, in *Chowdhury*, the court of appeals held that the Board abused its discretion in ruling that an alien's motion to reopen was successive and therefore numerically barred. 241 F.3d at 852-854. The court of appeals here, however, did not uphold the Board's denial on timing or numerosity grounds, but rather considered and rejected petitioner's claim based on facts relevant to the notice issue. Pet. App. 4a. In any event, the time lag between the deportation order and the motion to reopen was considerably shorter in *Chowdhury* than here. 241 F.3d at 849.[5]

3. It also appears that petitioner's motions to reopen were untimely. Although a motion to reopen to challenge an *in absentia* deportation order generally is not restricted by time or numerical limits (see Pet. App. 29a), a motion to reopen to seek discretionary relief

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[5] Petitioner also cites (at 13) an unpublished decision of the Second Circuit, *Singh* v. *Gonzales*, 177 Fed. Appx. 128 (2006). Even if a conflict between two unpublished dispositions could justify this Court's review, petitioner fails to account for a critical distinction: the Second Circuit's finding—unlike here—that the alien in that case "would only have benefitted from attending his June 2001 hearing, had he been aware of it," because he was *then* the beneficiary of an approved visa petition. *Id.* at 130.

from deportation (such as adjustment of status) must comply with the regulation's time and numerical limits. See *In re Cruz-Garcia*, 22 I. & N. Dec. 1155, 1160 (B.I.A. 1999), aff'd, 229 F.3d 1137 (3d Cir. 2000) (Table). Under 8 C.F.R. 3.23(b)(1) (2002) (now 8 C.F.R. 1003.23(b)(1)), "[a] motion to reopen must be filed within 90 days of the date of entry of a final administrative order of * * * deportation * * *, or on or before September 30, 1996, whichever is later." Petitioner's motion to reopen, filed in November 2002, did not comply with that deadline. See *In re Cruz-Garcia*, 22 I. & N. Dec. at 1160 ("Insofar as the [alien's] motion to reopen requested an adjudication of her application for adjustment of status, the motion was untimely because it was not filed by September 30, 1996."). And there is no independent entitlement to adjustment of status that trumps that time limit. See, *e.g.*, *Mudric* v. *Attorney Gen.*, 469 F.3d 94, 98 (3d Cir. 2006) (while alien may be eligible for adjustment of status under immigration laws, he is not entitled to such benefits); *Naeem* v. *Gonzales*, 469 F.3d 33, 38-39 (1st Cir. 2006) (reopening and adjustment of status are discretionary in nature, not entitlements or rights); *Obioha* v. *Gonzales*, 431 F.3d 400, 409 (4th Cir. 2005) (alien has no legal entitlement to discretionary relief).

Petitioner nonetheless argues (at 23, 27) that he is entitled to reopening under 8 U.S.C. 1229a(b)(5)(C)(ii) (permitting rescission of an *in absentia* deportation order upon motion to reopen "filed at any time" if the alien demonstrates that the alien did not "receive" proper notice). But that provision—added by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 304(a)(3), 110 Stat. 3009-590—does not apply to petitioner. See

IIRIRA § 309(c)(1), 110 Stat. 3009-625 ("in the case of an alien who is in exclusion or deportation proceedings as of [April 1, 1997]—(A) the amendments made by this subtitle shall not apply, and (B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments"). In any event, as explained above, it should not be read to require reopening merely to allow an alien to seek adjustment of status based on a development that arose long after the fact, rather than to challenge the underlying deportation order.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2008

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No.: 08-8

Supreme Court, U.S.
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In the

Supreme Court of the United States

ROBERT R. WATSON,

Petitioner Pro-Se,

-against-

MICHAEL B. MUKASEY,

Respondent.

REPLY PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether respondent's brief is moot based on the fact that the question presented is inapplicable and has no relevance to the facts and law in instant case.

LIST OF PARTIES

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 2a-4a) is not published in the Federal Register but is reprinted at 255 Fed. Appx. 920. The decisions of the Board of Immigration Appeals (Pet. App. 26a-29a) and the Immigration Judge (Pet. App. 14a-17a) are unreported.

JURISDICTION

The Judgment of the Court of Appeals was entered on November 29, 2007. A Petition for rehearing was denied on January 25, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATEMENT OF THE CASE

On or about July 1st, 1986, I entered the U.S.A. at Mc. Allen Texas, without inspection. I was detained and released by the Border Patrol. I retained the service of an attorney Mr. Pena. It was rumored that if you paid him, he had an inside connection and would fix whatever needs fixing.

I departed to New York shortly thereafter. I stayed at my initial address for a very brief period.

My change of address was given to Mr. Pena but not to the INS, at this time I was not aware that I had an obligation to do so. There was no information in the OSC to this effect. Knowing that Mr. Pena could contact me if necessary and I had applied and received an approved Labor Certification I naively assumed that Mr. Pena was as good as rumored. Unfortunately this proved to be wishful thinking, Mr. Pena was disbarred shortly after I paid him and apparently he did not inform the Court of my change of address. The notice of hearing was sent to my previous address and returned to the Court as undeliverable, the same with the deportation order. The notices sent to Mr. Pena were also returned to the Court, similarly notated. I was ordered deported *in absentia* because being ignorant of the hearing notice, I could not attend. Even though I had possible relief in the form of an application for Labor Certification.

I have been trying to reopen and rescind deportation proceedings based on the irrefutable,

incontrovertible fact that I did not receive the notice of hearing, that I was not notified in the OSC *re* the change of address notification and thus had reasonable cause for my absence. I did not receive the hearing notice and my motions to rescind sought rescission based on the statute at 8 U.S.C. § 1229a (b)(5)(C)(ii). My motions are being denied despite the fact that these results are contrary to the plain language of the statute, which applies to all aliens who have not received the notice of hearing.

CONSTITUTIONAL REGULATIONS AND STATUTES

Former 8 U.S.C. section 1252 B(c)(3) of the Act: An in absentia deportation order may be rescinded:

> If the alien demonstrates that the required notice was not received or the alien was in Federal or State custody and that the failure to appear was not the aliens fault. A motion to reopen can be filed at any time.

8 C.F.R. § 1003.23 (b)(4)
(iii) Order entered in absentia in deportation or exclusion proceeding (A) An order entered in absentia in deportation proceedings may be rescinded only upon a motion to reopen filed:

> at any time if the alien demonstrates that he or she did not receive notice or if the alien demonstrates that he or she was in Federal or State custody and the failure to appear was through no fault of the alien.

(D) The time and numerical limitations set forth in paragraph (b)1) of this section shall not apply to a motion to reopen filed pursuant to the provisions of paragraph (b)(4)(iii)(A) of this section.

ARGUMENT

There are certain facts of instant case which are irrefutable and indisputable and they include (1) The Notice of Hearing was not received. (2) The Order to Show Cause did not advise me of my obligation to notify the Court of any address change and the consequences of not doing so. (3) The attorney of record was disbarred and the Court and the Immigration Judge were aware of this. (4) I am the beneficiary of an approved I-130 and "grandfathered" under I.N.A. § 245 (i). (5) My Motions to reopen sought rescission of the in absentia deportation order, based on the fact that the N.O.H. was not received.

Contrary to respondent's claim Resp. brf. 10. My motions to reopen and rescind the in absentia deportation order were not untimely Pet. App. 29a. They were subject to the Board's broad discretion. The discretion of the Board may be broad but it is not unfettered. Its discretion has to be exercised based on proven facts, applicable BIA and Circuit Courts precedents and the relevant Statutes. If its discretion was unfettered no BIA discretionary decisions would be subject to Judicial Review.

The evidence supporting my claim of non-receipt of the hearing notice is overwhelming. The IJ M & O Pet. App. 14a paragraph 4, states that the Notice of Hearing was returned by the United States Postal Service as undeliverable with the notation "moved not forwardable". It is a physical impossibility that the notice could be received by the

intended recipient and returned by the U.S.P.S. simultaneously. These two scenarios are polar opposite, they are mutually exclusive and cannot, absolutely cannot occur together. The Postal Service classified the notice as being undeliverable, meaning in plain English, that it could not be delivered.

Respondent's brief via the question presented and the legal argument within disingenuously attempts to reclassify my motions as seeking reopening for the purpose of adjustment of status. While this may be necessary to bolster respondent's arguments that my motions were untimely, Resp. Brf. 15, 16, and make relevant the question presented Resp. Brf. (i), the "entitlement to adjustment" argument Resp. Brf. 16 and "the 14.5 yrs time span". This effort is unavailing and futile when faced with the proven facts of instant case.

My motions to reopen categorically sought rescission due to the irrefutable fact that I did not receive the N.O.H. Respondent's brief proves this. Respondent's brief states that review was sought of the Board's denial of motions 3, 4 and 5 Resp. brf. 9. Motion No. 3 was seeking reconsideration of a denial of a motion to "Rescind, Reconsider and Reopen" filed August 2005, Resp. brf. 7. Motion 4 filed July 2006 titled "Motion to Reopen, Rescind and Change Venue" Resp. brf. 8. Motion No. 5 was one seeking reconsideration of Motion No. 4 decision.

Thus it was abundantly clear that my motions sought reopening so that the deportation order could

be rescinded and not adjustment of status as respondent is trying to portray.

Respondent's "entitlement to adjustment" arguments are without merit. The Statute at 8 U.S.C. 1252 B (c) (3) authorizes rescission once the alien demonstrated that the N.O.H. was not received. The petition for adjustment of status can only be adjudicated subsequent to rescission of the deportation order and not the other way around as respondent argues. Resp. brf. (i).

In my petition for writ of certiorari I should have argued that reopening and rescission was authorized by the statute at former 8 U.S.C.S. 1252 B(c)(3) and not 8 U.S.C.S. 1229 (a)(b)(5)(C)(ii) as the respondent correctly noted, Resp. brf. 16. This error should not be fatal to my petition as both statutes permit rescission once the alien demonstrates lack of receipt of the N.O.H.

As a matter of fact this correction by the respondent only strengthened my case. The statute at 8 U.S.C.S. 1252 B(c)(3) is plain and unambiguous, there are no riders attached, rescission is authorized once lack of receipt is established, unlike 8 U.S.C.S. 1229 a(b)(5)(C)(ii), which reads in part "If the alien demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2) of section 1 of this title" Pet. App. 8.

The statute authorizes rescission once non-receipt of the N.O.H. is established. The BIA was compelled to reopen and rescind my in absentia

deportation order. This is a non-discretionary decision. See precedent decision, *Mirales-Valdez v. Ashcroft*, 349 F.3d 213, 217 (5th Cir. 2003), holding that "whether an applicant satisfies the requirement of a given statute is a non-discretionary decision because it involves straightforward statutory interpretation and application of law to fact".

Instant case is under the purview of the Fifth Circuit and as such is subject to its precedent decisions. See BIA precedent decision, *Anselmo*, 20 I&N Dec. 25 (BIA 1989); *Abdulai v. INS* 239 F.3d 542 (3rd Cir. 2001) Pet. App. 18, 19.

Supreme Court Precedent also demands rescission of this deportation order. "If the intent of Congress is clear, that this is the end of the matter, for the Court, as well as the Agency must give effect to the unambiguously expressed intent of Congress". *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* 467 U.S.837, 842-43 (1984). This is particularly compelling as the Supreme Court is the final arbiter of all things legal in the land.

The 5th Cir. Panel relied on Estrada Trochez to support its decision to deny my petition for review. I argued that Estrada Trochez does not control, is inapposite and inapplicable to instant case. Pet. App. 22, 23. I also argued that this legal premise was already adjudicated and rejected by the BIA. 23 I&N Dec. 181 (BIA 2001) (Matter of In re G-Y-R-respondent). Respondent did not address these issues. This lack of response spoke volumes considering that my arguments rebutted and

invalidated the foundation of the 5th Circuit panel's decision.

Respondent did not address all questions presented, 4-6, Pet. App. (i), and they should be deemed waived as per Supreme Court rule 15.2 which reads in part "Any objection to consideration of a question presented based on what occurred in the proceeding below, if the objection does not go to jurisdiction may be deemed waived unless called to the Court's attention in the brief in opposition".

Respondent stated that the Immigration Act of 1990 which prescribe "the change of address warning" enactment was post my deportation proceeding. Resp. brf. 12. I will concede that point, respondent also stated "Here, the Board identified several reasons for denying reopening, including its determination that petitioner (1) failed to establish that the hearing notice was not properly sent to his last known address". Resp. brf. 11. The clause "notice sent to last known address satisfied notice requirement" was also added to the INA post my deportation proceeding thus inapplicable according to respondent.

This fact confirms my claim of improper notice. The I.J. conclusion of proper notice is invalid. Pet. App. 16a paragraph 7. The I.J. concluded that the hearing notice was properly served because said notice was mailed to the attorney of record. The I.J. made his conclusion in paragraph seven of said M and O, even though in an earlier paragraph (three) he noted that the attorney of record was disbarred

and even referred to official document verifying disbarment. Pet. App. 10a, 13a.

Respondent seems to be arguing that because 5th Circuit Panel decision was unpublished and unprecedential it did not necessarily have to comport with the law. Rep.brf.13. I beg to differ, all legal proceedings, even aliens in deportation proceedings are entitled to the right to fairness and due process embedded in the Fifth Amendment of the Constitution. See *Bridges v. Wixon*, 326 U.S. 145 (1945) which holds that the constitution applies to non citizen in deportation proceedings or in INS custody.

Respondent claims that this decision does not conflict with any other Court of Appeals decision. Resp.brf.14. This is patently false. After examining respondents logics supporting this statement, it becomes readily apparent that the possibility that any decision would be in conflict with another is extremely remote. Respondent emphasizes the difference in the minutae between cases while ignoring the obvious similarity in the specific and relevant principle present in the cases sited.

In Lahmidi v. INS Rep.brf.13, even though the 1990 act was post my proceeding, the basic principle involved is identical "for an alien who had not received notice and had not been advised to update his address "Rep.brf.13, and would still be relevant.

Re in Sabir, respondent emphasize that fact that I did not tamper with my mailbox and did not

provide an address while ignoring the core issue involved. In an effort to highlight the obvious similarity with Sabir and demonstrate the fallacy of respondent argument I will include relevant facts present in instant case in parenthesis.

"Although I.J. properly entered initial in absentia order of removal *[Deportation]* based on attempted service under 8 U.S.C.S. § 1229(i) *[U.S.C. 1252(b)]*. IJ should of have granted alien's motion to reopen, under 8 U.S.C. § 1229a(b)(5)[*8 U.S.C. § 1252B(c)(3)*] in face of conclusive proof that he did not receive note [*Pet.App. 15a paragraph 4*] and that there were not bases in the record to show that the alien thwarted delivery [*lack of advisal re-address change notification in O.S.C. Pet.App.5a-9a*]

As in Chowdry the BIA in several decisions incorrectly and unlawfully denied reopening claiming that they were time and numbered barred. Pet.App.26a, 27a. The pertinent issue ignored by respondent is that the 7th and 9th Circuit agreed that "the INS should not deny reopening of an in absentia deportation order where the denial leads to the unconscionable result of deporting an individual eligible for relief from deportation." See approved I-130 Pet. App. 18a.

Finally respondent claims that the 5th Circuit panel's decision is not in conflict with *Joshua v. Ashcroft*, 389F.3d 732 (7th Cir. 2004) Res Brief. 14, 15. This is particularly egregious. A decision whether to grant or deny a motion to reopen that seeks rescission of an in absentia deportation order

based on claimed lack of receipt of the N.O.H. pursuant to the statute at *8 U.S.C. § 1252 B(c)(3)* can only be legally and lawfully decided by first determining whether or not said N.O.H was received.

My motions undeniably sought reopening so as to rescind the in absentia deportation order. My motions were based on proven non-receipt of the NOH. This is identical to the issue present in Joshua v. Ashcroft where the court opined "*where issue is not notice but receipt,* because statute allows alien ordered deported, removed in absentia proceedings to re-open proceedings *if he did not receive notice* (emphasis mine) even if notice that was sent, whether or not it was received satisfied statutory and constitutional requirement, intended recipient affidavit of non-receipt is evidence. Multiple affidavits were submitted averring to non-receipt Pet.App. 16a,42a.

Additionally the 7th Cir. Court of Appeals also observed "that even if notice is properly served in accordance with the statute, the key issue in deciding whether to reopen proceedings after an entry of an in absentia order is "*whether notice was received*".

Respondent also stated that "There was no claim before the Court of Appeals...The evidence that petitioner submitted" Resp. brf. 15. This statement has no basis in the facts of the case. See pet. App. 15-16. Respondent has totally ignored the issue of non-receipt of the N.O.H. This is perplexing,

considering that the decision to grant or deny the petition for the writ of certiorari rest on this seminal issue.

The statute at 8 U.S.C. 1252 B(c)(3) authorizes rescission once non-receipt of the N.O.H. is demonstrated. The regulations at 8 C.F.R. 1003.23 (b)(4)(iii) mirror the statute. BIA precedent Matter of Cruz-Garcia Pet. App. 8 and Matter of Mancera pet. App. 37a same.

This proven non-receipt seems to be a panacea for all alleged defect argued in respondent brief, defacto rendering moot the entire brief.

Proven lack of receipt nullifies the timelines issue as the motion to reopen can be filed at anytime. The 14 yrs time spent on which the BIA and respondent places such great emphasis is rendered irrelevant. Resp. brf. 6, 8, 11, 14, 15.

See Court of Appeal precedent decision which holds that "No Courts or Court Appeal have placed any limitations on the time between the alien becomes aware of the in absentia deportation order and the time the motion to reopen is filed. As the statute states the motion to reopen can be "filed at anytime"(citation omitted). In Matter of Mancera deportation proceeding was reopened after 10 yrs. See also Court of Appeal precedent decision holding that "Decisions cannot be affirmed based in irrelevant issues". (citation omitted).

Proven lack of receipt authorizes rescission and compels reopening. The fact that non-receipt was established satisfied the statute at 8 U.S.C. 1252 B(c)(3) and the BIA was compelled to reopen proceedings. This was no longer a discretionary decision.

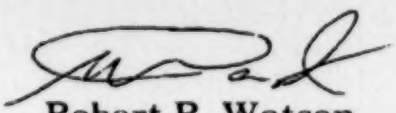
The fact that rescission was required as per the statute voided and made irrelevant the citation to Cruz-Garcia Res. brf. 16. One the order is rescinded, there is no longer "a final administrative order of deportation".

Finally, proven non-receipt of the NOH demonstrates once and for all the illegality of the 5th Cir. Panel's decision, reads in part "Watson has not shown any error... reasonable cause for failure to appear. Pet. App. 4a. See BIA precedent Matter of Heim, 19 I&N Dec. 641 (BIA 1988) which holds that "Motion to reopen shall be granted where "reasonable cause" is present to explain failure to appear; "reasonable cause" can include failure to receive notice. See also Urbina-Osejo v. INS (9th Cir. 1997)

This 5th Cir. Panel's decision effectively reads 8 .S.C. 1252B(c)(3) out of the I.N.A.

CONCLUSION

Based on the irrefutable, indisputable and uncontested facts, the relevant BIA, 5th Circuit and Supreme Court precedents and applicable statutes, the petition for writ of certiorari and the relief it seeks should be granted.



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